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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No.

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ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
*Petitioner,*

v

SECURITIES AND EXCHANGE COMMISSION,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Association of Massachusetts Consumers, Inc. ("Association"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 24, 1975.

### OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit sought to be reviewed here is reported at 516 F.2d 711 (D.C. Cir. 1975), and is reprinted in Appendix A, *infra*, pp. 1a-9a.

The memorandum opinions and orders of the Securities and Exchange Commission ("SEC") issued on October 31, 1973 and January 11, 1974, and affirmed by the court below are reprinted in Appendix A, *infra*, pp. 10a-25a.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether SEC, in carrying out a divestiture twice mandated by this Court (*Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176 (1966); 390 U.S. 207 (1968)) denied consumer interests the protection required by those mandates and by the Public Utility Holding Company Act of 1935, when SEC accepted and approved an out-of-time plan for the sale of securities by a registered holding company to an exempt holding company and did so without investigation and without hearing, although consumer interests credibly challenged the lawfulness of the transaction and sought an investigation and hearing.

2. Whether SEC, in administering divestiture relief under the Public Utility Holding Company Act of 1935 and the mandate of this Court, impermissibly failed to enforce the policies of the law with respect to holding companies which favor consumer interests and require the application of antitrust principles to utility regulation.

## STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2, 9, 10, and 11 of the Public Utility Holding Company Act ("Act"), 15 U.S.C. 79a, 79b, 79i, 79j and 79k. The relevant excerpts are printed in Appendix B, *infra*, pp. 26a-41a.

## STATEMENT

The Association files this petition with the endorsement and support of the Massachusetts Consumers' Council, an agency of the Commonwealth of Massachusetts, in order to maintain and defend consumer interests, which although protected by the Public Utility Holding Company Act of 1935, have otherwise been unrepresented in this case.[1]

In 1957 SEC instituted proceedings under Section 11 of the Act to determine whether the New England Electric System ("NEES"), a public utility holding company registered under the Act, was to be permitted to retain an aggregate of eight gas and seven electric utility systems which it then controlled. SEC determined that the electric properties constituted a single integrated system (*New England Electric System*, 38 S.E.C. 193 (1958)), which NEES elected to retain, and in 1964 ordered divestiture of the eight gas utility companies held by NEES (*New England Electric System, et al.*, 41 S.E.C. 888 (1964)).[2]

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[1] Appendix C, *infra*, pp. 42a, is a copy of a Resolution adopted by the Massachusetts Consumers' Council on September 11, 1975, supporting the petitioner's position herein.

[2] The eight companies were: Central Massachusetts Gas Company, Lawrence Gas Company, Lynn Gas Company, Mystic Valley Gas Company, North Shore Gas Company, Northampton Gas Light Company, Norwood Gas Company and Wachusett Gas Company. SEC acknowledged that these companies constituted a single integrated gas utility system. (41 S.E.C. 888)

Successful appeals by NEES were twice taken through the Court of Appeals for the First Circuit to this Court and twice this Court reversed the appellate decisions. In its second decision, rendered March 5, 1968, this Court directed that a judgment be entered affirming the Commission's 1964 order.[3] That judgment was issued on April 3, 1968 by the First Circuit, thus ostensibly terminating a protracted and major disagreement in favor of SEC's exercise of its responsibilities under the Act, and activating those provisions of the Act under which the Commission must discharge further responsibilities to accomplish, "as soon as practicable,"[4] the divestiture program it had initiated in the public interest in 1957.

Thereafter proceedings in this cause slowed to the stateliness and imperceptibility of geologic time. The "as soon as practicable" scheduling of divestiture was abandoned by SEC, and the April 1970 deadline imposed by Section 11(e) of the Act was ignored. NEES's first divestiture plan was not filed until September 1, 1971, and was limited in scope, relating to only four small companies.[5] Not until March 1973 did

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[3] The various opinions and orders comprising this saga are listed for convenience: *New England Electric System*, 41 S.E.C. 888 (1964), *affirmed initially*, *SEC* v. *New England Electric System*, 384 U.S. 176 (1966), *reversing* 346 F.2d 399 (1st Cir. 1965); *affirmed on second appeal*, *SEC* v. *New England Electric System*, 390 U.S. 207 (1968), *reversing*, 376 F.2d 107 (1st Cir. 1967). See also Holding Company Act Release (HCAR) No. 16618, February 24, 1970.

[4] 15 U.S.C. §§ 79a, 79k.

[5] Central Massachusetts Gas Company, Norwood Gas Company, Wachusett Gas Company and Northampton Gas Company. HCAR No. 17066, March 25, 1971. Northampton was subsequently acquired by Springfield Gas Light Company as part of the first phase of the divestiture plan adopted by NEES.

SEC notice NEES's proposed divestiture of its Lawrence Gas Company stock to Springfield Gas Light Company, an exempt holding company controlled by the Tenney Group [6] and subsequently merged into Bay State Company, another exempt holding company under the same control.

By petition filed April 9, 1973, the Association requested a hearing on the Lawrence matter and its consolidation with a companion proceeding in which NEES sought approval of its plan for the sale of stock of three other of its subsidiary gas companies to Eastern Gas and Fuel Associates ("Eastern") and in which the Association was granted participation.[7] After a lengthy hearing the Eastern proceeding was settled. With respect to the Lawrence proceeding, SEC took no action on the Association's request for a hearing and consolidation until, in its Memorandum Opinion issued on October 31, 1973 (Appendix B, *infra*, pp. 10a-14a), it summarily denied the Association's request and approved the sale of the Lawrence stock to Springfield. Thereafter, on January 11, 1974, SEC reaffirmed that decision in response to the Association's application for a rehearing (Appendix B,

[6] The Tenney Group is a de facto holding company or organization, unregistered and unregulated, which has brought under common control various gas and electric utility properties operating in Massachusetts, New Hampshire, Pennsylvania, New Jersey and New York, as follows: Brockton-Taunton Gas Company; Concord Electric Company; Exeter and Hampton Electric Company; Fitchburg Gas and Electric Light Company; Orange and Rockland Utilities, Inc. (See FPC September 15, 1975 Order to Show Cause, reprinted in Appendix D, *infra*, pp. 43a-49a.)

[7] The two plans constituting the last phase of the NEES divestiture were concurrently before the Commission, i.e., Administrative Proceeding File No. 3-4053, the Lawrence proceeding; and Administrative Proceeding File No. 3-4052, the Eastern proceeding.

*infra*, at pp. 15a-25a). By an opinion filed July 24, 1974, appeals for the District of Columbia Circuit sustained SEC's action (Appendix B, *infra*, at pp. 1a-9a).

## REASONS FOR GRANTING THE WRIT

### 1. The Court Should Compel Full Obedience to Its Mandates in This Case.

*Certiorari* will invoke the supervisory power of this Court to enforce and make meaningful the divestiture it has twice approved in *SEC* v. *NEES* and which is required by the Public Utility Holding Company Act of 1935. This Court has both the authority and the disposition to require its mandates to be fully carried out. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States* v. *E.I. DuPont DeNemours & Co*, 366 U.S. 316, 325 (1961).

By permitting Lawrence Gas Company to be belatedly transferred from NEES to the Tenney Group under the aegis of this Court's opinions and the Act without any hearing or investigation, and over the protests of the Association, SEC has seriously misconstrued this Court's mandate, and has failed to fulfill its own enforcement role in the administration of relief. This Court could hardly have had in mind, when it supported SEC's position in the litigation back in 1968 and earlier, that SEC would falter and slacken in its enforcement efforts, and would fail to apply the standards of the Act in carrying out the divestiture it was seeking. But that is precisely what SEC has done, with the result that the entire exercise has been rendered futile in that it has not resulted in significant relief. In terms of consumer benefit and public interest, nothing has been accomplished beyond the termination of common proprietorship over gas and electric

distribution properties in Lawrence's service area. State Utility Commission control over such service makes this a marginal benefit. And transfer of control over Lawrence Gas Company from a *regulated* holding company with electric utility interests to an *unregulated* holding company with electric utility interests is not simply meaningless; it is counterproductive.

Although it is *prima facie* suspect, this transfer has remained untested by adversary proceedings. Such proceedings, with the participation of the Association, could have explored alternative divestiture proposals, such as spin-off or sale to independent investors. Administrative consideration of such proposals would seem better to serve public interests and consumer rights by promising, not a diluted, ambiguous and absentee operation serving the needs of a multi-state multi-utility holding group, but instead a management wholly concerned with the interest of Lawrence Gas Company and the municipality and customers upon which it should depend. In the light of such proceedings the significance of the Tenney Group's acquisition of the Lawrence property could have been explored and a factual basis established for predicting its impact upon the consumer interests which the Act and this Court have sought to protect. Indeed, the proceedings might have shown that an independent Lawrence Gas Company would have provided yardstick competition for the giant utilities which today dominate gas distribution in Massachusetts.

SEC's performance in the Lawrence proceeding has been truly amazing. It usurped the function of this Court by varying from the mandates of *SEC* v. *NEES*.

It abdicated its own function in two respects. First, it ignored its statutory duty to protect consumer interests, refusing meaningful intervention to consumers represented by the Association (the only consumer entity which sought intervention), and failing to conduct an investigation and hearing so that the public interest factors in the divestiture could be evaluated and protected in the light of a developed record. Second, SEC departed from the legal norms established by the Act and endorsed by this Court to test the NEES divestiture and the Tenney Group acquisition, namely the antitrust and consumer public interest standards embodied in Sections 1, 9, 10 and 11 of the Act.

To illustrate the lawlessness of SEC's treatment, consider the affiliate question. Springfield had acquired Northampton Gas Light Company through a previous divestiture sale by NEES. Thereby Springfield became an "affiliate" of Lawrence as defined by Section 2(a)(11)(A) of the Act. An affiliate relationship triggers SEC investigations and requires SEC approval of the proposed acquisition pursuant to Sections 9 and 10 of the Act. SEC ignored these requirements of law, and did not deal substantively with the matter by investigation, hearing and formal approval. Instead it claimed that the "substance" of the transaction took it out of the Act. And this despite the fact that Congress expressly provided in Section 10 for SEC investigation and approval of a proposed acquisition offered, as was this one, to comply with a Section 11(b) divestiture order. If SEC had done its duty it would have found that the divestiture of gas utility companies from the economically powerful control of NEES into the concentrated control of the Tenney Group was inconsistent with the provisions

of 10(b) of the Act proscribing acquisitions which tend toward interlocking relations of a kind or to an extent detrimental to the public interest or the interest of investors.[8]

**2. This is an Important Test Case Which Will Determine the Direction and Efficacy of SEC Enforcement of the Public Utility Holding Company Act With Respect to Combination Electric/Gas Utilities.**

Back in 1957 when SEC began this entire proceeding, it was recognized as the demonstration or trial run of SEC's powers under the Act to deal with the anti-competitive problems posed by combination electric/gas utilities. Today there are seventy-six such utilities, each with annual operating revenues in excess of $1 million.[9] To the extent that these utilities are vulnerable under the standards of the Act because of holding company involvement,[10] the outcome of this case will determine whether SEC will proceed against them, and if it does, whether consumer interests will be granted effective participation to carry out the purposes of the Act.

If the public benefits flowing from the enforcement of the Act are as miniscule as the present status of this test case indicates, the case will have demonstrated that as a practical matter enforcement of the Act is a game to be played or forfeited at the uncontrolled

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[8] See Appendix D *infra*.

[9] FPC Document S-247: Statistics of Privately Owned Electric Utilities in the United States.

[10] Under the Act SEC has jurisdiction over seventy-eight electric and/or gas utility subsidiaries in twenty active holding companies controlling $33 billion in assets. See SEC 1974 Annual Report, Tables 27 and 28, pp. 176, 177.

option of SEC, and a game to be won by utility interests willing to play on and on forever. Such a conclusion flies in the face of the Act itself, flouts the earlier decisions of this Court in this case, and rewards unregenerate and protracted resistance to the enforcement powers with ultimate victory.

Moreover, unless *certiorari* is granted, and effective and meaningful relief achieved in this test case, its second teaching will be made clear: that responsible consumer interests can claim no significant participation in the enforcement of the Act. The Court should be aware that this is the only test case to survive out of the entire NEES proceedings. The first four divestitures in this litigation were small and insignificant, and SEC's approval of them went unchallenged. The next three—the Eastern proceedings, wherein the Association actively participated—resulted, after extended investigative hearings, in a settlement of the consumer issues which was secured in part by the Association. Under that settlement the affected municipalities were given options to acquire the divested systems for municipal operation.

The last remaining divestiture is the present case, wherein the Association has been denied a hearing and effective participation, and the outcome of this case, if unreversed, is a travesty which will certainly not stimulate any further efforts by SEC to enforce the Act and will with equal certainty discourage consumer organizations from involving themselves with it. On the other hand, if the Lawrence Gas Company were to be divested in full compliance with all of the provisions of the Act, including the standards of Sections 9, 10 and 11, with due attention given to the interests of

consumers as well as investors, it would serve as a model after which future SEC compliance programs can be patterned.

Either way, the lesson of this case will not be lost on the combination electric/gas utilities which are vulnerable under the Act.

## CONCLUSION

The Court below, by sustaining SEC's position in the Lawrence proceeding, adopted as its own the grave legal error committed by SEC as hereinbefore shown. Accordingly the writ prayed for should issue.

Respectfully submitted,

Association of Massachusetts Consumers
By: Rowley & Scott
Worth Rowley
James F. Fairman, Jr.
Patrick F. Martin

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INCORPORATED,
*Petitioner,*

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
*Respondent,*

New England Electric System Bay State Gas Company,
Intervenors.

No. 74-1325.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 27, 1975.

Decided July 24, 1975.

RIVES, *Senior Circuit Judge:*

Without a hearing, the Securities and Exchange Commission (Hereafter referred to as "Commission") approved the final step in compliance with its order requiring the New England Electric System ("NEES")—a statutory holding company under the Public Utilities Holding Company Act of 1935 (15 U.S.C. § 79) (hereinafter the Act)—to divest itself of all ownership in gas utility companies. The Association of Massachusetts Consumers, Inc. ("AMC"), an intervenor in the proceedings before the Commission, challenges the actions of the Commission. We find that the Commission did not abuse its discretion and affirm its disposition of this case.

The controversy culminating in the present proceeding began over 18 years ago. In 1957, NEES held stock in a number of electric and gas utility companies serving New England. In that year, the Commission began proceedings,

under section 11 of the Act (15 U.S.C. § 79k), against NEES. The following year the Commission declared NEES' electric utility holdings to be an integrated system. (See § 2 of the Act, 15 U.S.C. § 79b). Six years later, the Commission ordered NEES to divest itself of the gas utility stock.[1] In 1968, after protracted litigation, the Supreme Court and the First Circuit affirmed the order.[2] In December, 1971, with approval of the Commission, NEES sold its stock in four of the gas utilities.[3] The following year NEES sought Commission approval of a plan to sell to the Boston Gas Company, an operating subsidiary of the Eastern Gas System, the assets of three utilities (plus another company related to those utilities), whose corporate shells would therafter be dissolved. In a separate application, NEES also proposed to sell to Springfield Gas Light Company its Lawrence Gas Company stock.[4] The plan required minority shareholders, whose holdings totaled 10% of the stock, to sell their stock to Springfield at the same price received by NEES. Springfield would then merge into its subsidiary, the Northampton Gas Light Company. The

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[1] NEES transferred its stock to a subsidiary, the Massachusetts Gas System. The latter held the stock until the divestment could be completed.

[2] See New England Electric System, 41 SEC 888 (1964), affirmed initially, SEC v. New England Electric System, 384 U.S. 176, 86 S.Ct. 1397, 16 L.Ed.2d 456 (1966), reversing, 346 F.2d 399 (1st Cir. 1965), affirmed on second appeal, SEC v. New England Electric System, 390 U.S. 207, 88 S.Ct. 916, 19 L.Ed.2d 1042 (1968), reversing, 376 F.2d 107 (1st Cir. 1967). See also Holding Company Act Release No. 16618, Feb. 24, 1970 (App. 107-108).

[3] Central Massachusetts Gas Co., Norwood Gas Co., Wachusett Gas Co. and Northampton Gas Co.

[4] Although the two proposed sales were to be made to different purchasers, bids were solicited by copies of the same letter. There was no difference in the bidding procedure in the two cases. The sales became separate proceedings after NEES had determined the highest bidders.

surviving company would change its name to Bay State Gas Company, and would hold all of the Lawrence stock.

Two petitions to intervene in the proceedings were filed by AMC—(1) in the Eastern proceedings to ratify the sale of the assets of the three utilities to Boston Gas, and (2) in the Bay State proceedings to ratify the sale of the Lawrence stock to Bay State. AMC moved that the Commission consolidate the proceedings and conduct a hearing. The Commission did not act upon AMC's motion, but it did allow AMC limited participation in the Eastern proceedings. Following the hearings in those proceedings, a settlement among the parties was reached, and the Commission approved the sale to Boston Gas. At about the same time, the Massachusetts Public Utility Commission held a public hearing on the proposed sale of the Lawrence stock to Springfield and the merger of Springfield into Northampton to form Bay State. The record of those hearings reveals no participation by AMC. The Massachusetts Commission approved the plan. On October 31, 1973, the Commission issued a memorandum opinion approving the sale of the Lawrence stock to Springfield and denying AMC's motion. The Commission denied AMC's request for reconsideration. AMC appeals to this Court, pursuant to § 24(a) of the Act (15 U.S.C. § 79x(a)).

The question before this Court is whether the Commission abused its discretion in refusing to consolidate these proceedings with the Eastern proceedings and in denying a hearing on the original motion or on the motion for reconsideration.

[1-3] The law is clear concerning judicial review of an administrative body's refusal to consolidate two proceedings.

> "No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications

> are pending at the same time. Consolidation * * * and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts."

City of San Antonio v. C. A. B., 126 U.S.App.D.C. 112, 374 F.2d 326, 329 (1967) (footnotes omitted). Consolidation would have needlessly delayed resolution of the Eastern proceedings. The failure to consolidate prejudiced none of AMC's rights in either proceeding. The Commission's refusal to consolidate the proceedings was a sound exercise of necessary discretion.

[4] On appeal, AMC submits that, contrary to the Commission's determination, three issues required a hearing:

> (1) the possible anti-competitive effects of the sale of Lawrence to a member of the "Tenney" group;
>
> (2) the possible application of sections 9(a)(2) and 10 [15 U.S.C. § 79i(a)(2) and § 79j] to the sale of Lawrence to Springfield;
>
> (3) the possible violation of the statute by NEES's submission of a voluntary plan for divestiture more than two years after the divestiture order became effective.

AMC must show more than that these were issues which the Commission could have considered. In addition, AMC must show that it presented them in compliance with the Commission's procedural rules. Rule 9 of the Commission's Rules of Practice, 17 CFR 201.9, requires that an intervenor state specifically the issues whose resolution requires a hearing. The published notice in the instant case called AMC's attention to that requirement. By timely motion, NEES complained that AMC was not in compliance with Rule 9.

AMC's compliance with the published notice was incomplete. It ignored NEES's motion, even though AMC's motion to intervene was vague as to the issues to be raised at any hearing. It did mention NEES's long delay in disposing of its gas utility stock and expressed suspicion about the fairness of the procedure by which NEES sought bids for the stock. In a letter, copy of which was appended to the motion, the president of AMC stated that the instant application raised "*many of the same objections* * * * raised against the proposed sale [in the Eastern proceedings]" (Emphasis supplied) (App. 156). Those three statements gave the only definition of the issues which AMC desired to explore in a hearing. AMC did not state that the Commission ignored any anti-competitive effects from the sale to Springfield,[5] nor did it argue that section 9(a)(2) governed this sale. It was only after the sale had been approved and on a petition for rehearing that AMC introduced those two issues.

The requirement that the intervenors specify the issues which demand a hearing serves important purposes. It enables the Commission to screen out frivolous requests for hearings and efficiently conduct hearings. Here, where the subject matter is so complex, poorly framed issues could turn the hearings into a maze in which justice could be lost. The strict application of those procedural rules seems appropriate here, where the intervenors were clearly on notice that they must comply with Rule 9. Nevertheless, since the intervenors argued that they represent important

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[5] It is true that in the Eastern proceedings AMC objected to the purchaser and stated that the Bay State sale was subject to "many of the same objections." Since any potential anticompetitive effects from the sale to the particular buyer stemmed from facts peculiar to each case, the Commission could not have surmised that, though the circumstances of the buyer in each case were entirely different, AMC wanted to transfer this particular objection from the Eastern proceedings to the Bay State proceedings. The reasonable interpretation was to the contrary.

public interests, out of an abundance of caution we construe their pleadings so as to protect those interests and consider all issues referred to in their original petition. We follow the same course in reviewing the issues mentioned in AMC's petition for reconsideration.

[5, 6] After showing that reference was made to an issue in its original petition for a hearing, AMC must show that the resolution of the issue required a hearing and that the denial by the Commission was an abuse of discretion. AMC bears an even heavier burden as to the issues first raised in its petition for reconsideration. Only a clear abuse of discretion warrants reversal for failure to grant a request for a rehearing. See United States v. Pierce Auto Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1946); United States v. I. C. C., 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970). At the very least, the latter standard requires AMC to show that a potential issue was present and the hearing would have helped resolve it.

[7] An issue mentioned in the original petition was whether the Commission erred in allowing NEES to submit a voluntary plan for divestiture five years after the divestiture order became effective. AMC submits that, under section 11(c) [15 U.S.C. § 79k(c)], a holding company has no more than two years in which to comply with a divestiture order. AMC asks that the Commission's approval of the sale be vacated and that the Commission be directed to proceed pursuant to section 11(d) [15 U.S.C. § 79k(d)]. Phillips v. Securities and Exchange Commission, 87 U.S.App.D.C. 380, 185 F.2d 746, 750 (1950) speaks to this question.

> "Sections 11(c) and 11(d) were designed to enable the Commission to deal with a recalcitrant company. But Congress could hardly have intended that an order entered by the Commission should become a trap closing down relentlessly at the end of a two-year period, against the judgment of the Commission, con-

trary to the provisions of the order entered, and to the damage of the very interests which Congress was endeavoring to protect—the public interest and that of investors. To give any such interpretation to the statute might well tend to cause the Commission to refrain from issuing any order in a particular case until the situation became ripe for complete and immediate enforcement."

Although NEES was slow in complying, within the two years it did make some progress by creating a subsidiary, the Massachusetts Gas System, to hold the gas utility stock. That progress and the Commission's satisfaction with the final plan are enough to satisfy the requirements of the Act.

[8-10] Another issue mentioned in the original petition was whether NEES maintained competitive conditions in soliciting bids for the stock. On appeal, AMC challenges the propriety of transferring the Commission's findings on that issue from the Eastern proceedings to the present one. We think that use proper. Since NEES solicited bids for all the utilities as a part of the same transaction, the circumstances of soliciting both bids were identical. Furthermore, AMC was not denied an opportunity to shape the record, for it participated in the hearing in the Eastern proceedings. The only complaint that AMC can make is that it would have tried harder in the Eastern hearing if it had known that that would be the only hearing. The Commission need not hold a hearing to gain information which has already been gathered. An administrative body may "mold its procedures to the exigencies of the particular case," Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 762, 93 S.Ct. 1870, 1880, 36 L.Ed.2d 635 (1973). Moreover, "[T]he mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." United States v. Pierce Auto Freight Lines, Inc.,

327 U.S. 515, 530, 66 S.Ct. 687, 695, 90 L.Ed. 821 (1946). AMC fails to show why the findings in the Eastern proceedings were wrong, or that the use of those findings was prejudicial. The findings were supported by substantial evidence and, clearly, there was no abuse of discretion.

[11] An issue which AMC raised for the first time in its petition for reconsideration was whether the sale would have anticompetitive effects. AMC contends that Springfield, the purchaser, belongs to an interstate group of gas and electric utilities known as the "Tenney" group. Those utilities have the same chief executive officer—a Mr. Tenney—and have in common several Board of Director members and officers. The Tenney family owns between 5 and 15% of the stock in each company. Although AMC concedes that the "Tenney" group does not fit within the statutory definition of a holding company, it argues that the Public Utilities Holding Company Act requires the Commission to ensure that any divestment will promote the objectives of the Act. In short, AMC asks this Court to hold that, even though the Commission could not order the "Tenney" group to sell the Lawrence stock—if any were owned, it must forbid the group to buy any of the Lawrence stock. We find it unnecessary to resolve that issue. To prevail at a hearing on the matter, AMC would have to show that, although the "Tenney" group was not a statutory holding company,[6] it was a source of the same abuses and vices which led the Congress to enact the Public Utilities Holding Company Act. See § 1, 15 U.S.C. § 79a. Elimination of common officers and directors in noncompeting utility companies was not the precise purpose of the Act. AMC makes no allegation that the "Tenney" group is the source of any evils set forth in section 1 of the Act (15 U.S.C. § 79a). AMC having failed to show that there would have been substantial issues raised at the hearing—

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[6] See the definition of holding company in section 2 of the Act, 15 U.S.C. § 79b.

even if its interpretation of the Act were correct (a question we do not reach), we find that the Commission did not abuse its discretion in refusing to vacate its approval of the sale.

[12, 13] The remaining issue raised in the petition for reconsideration was whether this transaction fell within the ambit of section 9(a)(2) of the Act [15 U.S.C. § 79i(a)(2)] and, hence, required Commission approval (see § 10 of the Act, 15 U.S.C. § 79j). Since Springfield merged into Northampton after it had bought the Lawrence stock, for an instant there were three entities—Northampton, Lawrence and Springfield. Thus, AMC argues that Springfield, which was already an affiliate of Northampton, was buying the stock of a utility company. Section 9(a)(2) forbids such a purchase without Commission approval. The Commission concluded that the merger of Springfield into Northampton was so closely related to the sale that the transaction should be viewed as one in which Northampton, a company without an affiliate, obtained the Lawrence stock. We find the Commission's reasoning persuasive. In assessing interrelated corporate adjustments, comparison should be made of the situation just prior to and immediately following the adjustments. The sequence of relatively simultaneous corporate adjustments whose order has no practical effect do not govern the applicability of section 9(a)(2). The same result would not obtain where the sequence of corporate adjustments had a harmful effect on investors or the public.

Finding no reversible error, we affirm the judgment of the Commission.

Affirmed.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Release No. 18149/October 31, 1973

Admin. Proc. File No. 3-4053

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248)

(70-5275)

MEMORANDUM OPINION APPROVING SECTION 11(e) PLAN

This proceeding relates to a plan of New England Electric System ("NEES"), a registered holding company, and its subsidiary holding company, Massachusetts Gas System ("Mass Gas"), filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("Act") and other applicable provisions and rules thereunder, including Section 12(d) and Rule 44. The plan proposes that NEES sell its capital stock interest in the Lawrence Gas Company ("Lawrence"), a subsidiary company, to Springfield Gas Light Company ("Springfield"), an exempt holding company under the Act pursuant to Rule 2 thereunder.[1] It also provides for the liquidation of Mass Gas and the elimination of the minority shareholder interest in Lawrence.

A notice of the filing was issued,[2] and the Association of Massachusetts Consumers ("AMC"), a non-profit organization, requested that a hearing be held. It also requested that we consolidate this hearing with the hearing which we ordered at the request of AMC and others on the Section

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[1] See, *New England Electric System*, 41 S.E.C. 888 (1964), affirmed *SEC* v. *New England Electric System*, 390 U.S. 207 (1968).

[2] Holding Company Act Release No. 17906 (March 14, 1973).

11(e) plan of NEES proposing to sell its stock interests in its other gas subsidiaries.[3] Subsequently, the controversy as to the latter plan was settled, and AMC and the other parties to the settlement have withdrawn from the proceeding.[4] AMC gave no reasons to support its request for hearing, as directed by our notice. The record is sufficient to render a decision in this proceeding without a hearing. The request for such hearing is hereby denied.

Under the plan, Mass Gas, which is to be liquidated, will transfer to NEES its holdings of 90.42% of the capital stock of Lawrence. NEES will then sell the Lawrence stock to Springfield, a Massachusetts Gas utility,[5] for $6,638,000 in cash. Concurrently with the Lawrence acquisition Springfield will be merged into Bay State Gas Company ("Bay State"), presently a Springfield subsidiary company, and Lawrence will be retained by Bay State as a subsidiary company.[6] Bay State proposes to claim an exemption as a holding company under Rule 2 of the Act. The minority shareholders of Lawrence will be paid the same price per share as that paid to NEES.

Lawrence is a gas utility company which supplies gas service to over 30,000 customers in four communities in northeast Massachusetts, with an estimated population of 140,700. In 1972 Lawrence had a net operating income of $977,858, net income of $462,865, and net utility plant of $14,767,993. Gas sales by Lawrence totaled 4,353,298 Mcf for that year. Lawrence has outstanding 188,000 shares of common stock, of which 170,002, is owned indirectly by

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[3] Holding Company Act Release No. 17908 (March 16, 1973).

[4] Holding Company Act Release No. 18133 (October 25, 1973).

[5] The acquisition of the Lawrence stock was approved by the Massachusetts Department of Public Utilities in D.P.U. 17726, dated October 10, 1973.

[6] As a result of the concurrent merger, Lawrence will be Bay State's sole statutory affiliate. The proposed acquisition is therefore not subject to Sections 9(a) (2) or 10 of the Act.

NEES through Mass Gas. The balance of 17,998 is publicly held. Lawrence's pipeline natural gas is supplied by Tennessee Gas Pipeline Company, which also supplied Springfield.

We find, as required by Section 11(e), that the plan is necessary to comply with Section 11(b). Our order thereunder directed NEES to divest its interests in its gas utility companies, including Lawrence, and the sale of Lawrence does that. The retirement of the minority shares of Lawrence, as we have held in other cases,[7] is required under Section 11(b)(2).

We also find under Section 11(e) that the plan is "fair and equitable" to NEES and the minority shareholders of Lawrence. The highest bid received by NEES was the one from Springfield, in the amount of $6,638,000, plus or minus a dollar for dollar adjustment by the amount of any increase or decrease in the underlying book value of the shares between December 31, 1971, of the Lawrence shares to be sold by NEES.[8] The minority shareholders will receive the same premium as NEES. This premium over book value compares very favorably when tested against the sales of securities of similar companies. The per share price to be paid is 14.82 and 13.96 times Lawrence's earnings for the years 1972 and 1971, respectively.

The sale of the Lawrence stock is also subject to Section 12(d) of the Act and Rule 44 promulgated thereunder, including the requirement that competitive conditions shall be maintained with respect to the sale.[9] NEES solicited ex-

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[7] *Northeast Utilities*, Holding Company Act Release No. 15448 (April 13, 1966); *Lynn Electric Company*, 40 S.E.C. 828, 833 fn. 9 (1961); *New Orleans Public Service*, 40 S.E.C. 887 (1961).

[8] The adjusted contract price would represent 183% of the underlying book value of the shares at December 31, 1972.

[9] By order, dated November 23, 1971, we granted NEES an exemption from the competitive bidding requirements of Rule 50. Holding Company Act Release No. 17371.

pressions of interest, either for the separate purchase of Lawrence or together with its other remaining gas properties, by individual letters and by newspaper advertisements. NEES conducted exploratory discussions with those who expressed an interest in Lawrence, and at various times sent additional information to them. Throughout the prebidding period NEES provided the same basic information to all who continued to have a serious interest in the acquisition of Lawrence. NEES received sealed bids for Lawrence at the same time and it reviewed them at the same time. These procedures afforded a fair opportunity for all persons seriously interested to make offers and for NEES to secure the maximum price reasonably obtainable. We conclude that NEES maintained competitive conditions in offering to sell Lawrence and in choosing Springfield as the successful bidder.

The liquidation of Mass Gas and the transfer of its assets and liabilities to NEES will be recorded at the values carried on the books of Mass Gas. NEES proposes to record the sale of the common stock of Lawrence by (1) a debit to its cash account in the amount of the sales price; (2) a credit to its investment account in the amount of the book value of the shares sold and (3) a credit to dividend income in an amount equal to the undistributed income having accrued from the time the NEES system first acquired the Lawrence shares. An amount equal to cash in excess of the above credits will be credited to the earned surplus account representing the gain to NEES from the sale. Among other things, the order by the Massachusetts Department of Public Utilities approving the acquisition by Springfield requires it to segregate the excess of acquisition price over the book value of the Lawrence assets and to amortize that amount over the life of the associated property.

NEES and Mass Gas have requested that our order entered herein recite that each of the transactions, exchanges,

sales and investments proposed in the plan are necessary or appropriate to effectuate the provisions of Section 11(b)(1) of the Act, in accordance with the requirements of Sections 1081 through 1083 of the Internal Revenue Code of 1954, as amended. This request will be granted. No fees or commissions will be paid by NEES or Mass Gas in connection with the sale. Certain services, incident to the transactions, have been or will be performed by New England Power Service Company, the system service company, at cost. A post-effective amendment will be filed setting forth these costs.

We conclude that the proposed transactions satisfy the provisions of the Act and the rules thereunder. An appropriate order will issue.

By the Commission. (Chairman GARRETT, Commissioners LOOMIS, EVANS and SOMMER. Commissioner OWENS not participating.)

GEORGE A. FITZSIMMONS
*Secretary*

Release No. 18149/October 31, 1973

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248, 70-5275)

ORDER APPROVING PLAN FILED UNDER SECTION 11(e)

The Commission having issued its Findings and Opinion and Order dated March 19, 1964 (Holding Company Act Release No. 15035, 41 SEC 888), pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935 ("Act") requiring divestment by New England Electric System ("NEES") of all its interests, direct or indirect, in its gas-utility subsidiary companies, and having ordered therein under Section 11(b)(1) that NEES dispose of its interests in its gas properties:

NEES and Massachusetts Gas System ("Mass Gas") having filed a plan, as amended, pursuant to Section 11(e) of the Act, to effectuate compliance with the Section 11(b)(1) order by the proposed divestiture of Lawrence Gas Company ("Lawrence"); to retire the minority stock interest in Lawrence and to carry out the other proposals therein specified.

The Commission having considered the record and having this day issued its Memorandum Opinion, concluding therein that the plan, as amended, is necessary to effectuate the provisions of Section 11(b)(1) of the Act and is fair and equitable to the persons affected thereby; and that NEES maintained competitive conditions in the bidding and proposed sale of Lawrence to Springfield, as required under Section 12(d) of the Act;

NEES and Mass Gas having requested the Commission recite in its Order that the transactions proposed are nec-

essary or appropriate to the integration of the NEES holding company system in accordance with the provisions of Section 11(b) of the Act and with the requirements of Section 1081 through 1083 of the Internal Revenue Code of 1954, as amended:

It Is Ordered that the request for hearing of the Association of Massachusetts Consumers is hereby denied; and

It Is Further Ordered, pursuant to Section 11(e) and other provisions of the Act and Rules thereunder, that said plan, as amended be, and it hereby is, approved, effective forthwith; and

It Is Hereby Determined and Ordered that each of the transfers, sales, exchanges, expenditures and investments described in subparagraphs I and II below is necessary or appropriate to the integration or simplification of the holding-company system of which New England Electric System is a member, and to the effectuation of the provisions of Section 11(b) of the Act, and that each such transaction is hereby authorized, approved and directed; that the sale and transfer described in subparagraph I below is ordered to be consummated within 120 days from the date of this Order; and that the expenditures or investments described in subparagraph II below are ordered to be made within 24 months of such sale and transfer. The transactions to which this Order relates, the stocks which are to be transferred, sold and exchanged, and the expenditures or investments which are to be made, are specified and itemized as follows:

I. New England Electric System shall sell and transfer to Springfield Gas Light Company 170,002 shares of capital stock of par value of $10 per share of Lawrence Gas Company in exchange for cash in the amount of $6,608,000, plus or minus the net increase or decrease in the book value thereof between December 31, 1971, and the end of the calendar month next preceding such sale and transfer.

II. An amount equal to the amount of cash received by New England Electric System upon the sale and transfer of such shares of capital stock of Lawrence Gas Company, as hereinabove ordered, shall be expended or invested by New England Electric System in one or more of the following manners: for stock of, or as a contribution to the capital or as paid-in surplus of, one or more corporations which are at the time of such expenditure or investment electric utility subsidiaries of New England Electric System, including but not limited to the following:

Massachusetts Electric Company,
The Narragansett Electric Company,
Granite State Electric Company and
New England Power Company

or in repayment of short-term notes issued by New England Electric System evidencing indebtedness originally incurred by New England Electric System on November 15, 1972, in the principal amount of $30 million, which amount was invested in common stock of said New England Power Company.

It Is Further Ordered that jurisdiction be, and it hereby is, reserved to take such action or enter such further orders as may be appropriate to carry out the provisions of Section 11(b) and the plan approved herein, including, insofar as may be necesary, judicial enforcement of the provisions in the plan for the elimination of the minority interest in Lawrence.

By the Commission. (Chairman Garrett, Commissioners Loomis, Evans and Sommer. Commissioner Owens not participating.)

George A. Fitzsimmons
*Secretary*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

**Public Utility Holding Company Act of 1935**

Rel. No. 18254/January 11, 1974

Admin. Proc. File No. 3-4053

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS GAS SYSTEM
Westborough, Massachusetts

(54-248)

(70-5275)

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER GRANTING LEAVE TO FILE PETITION OUT OF TIME AND DENYING PETITION FOR REHEARING

On October 31, 1973, we approved a plan of New England Electric System ("NEES"), a registered holding company, filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("Act"), and denied an application filed by the Association of Massachusetts Consumers, Inc. ("AMC") requesting a hearing on the plan and moving for consolidation of the proceeding on such plan with another NEES proceeding.[1] On December 4, 1973, AMC petitioned for rehearing with respect to our order. NEES opposes this petition but takes no position on AMC's motion for leave to file its petition out of time.[2]

The plan proposed that NEES sell its capital stock interest in the Lawrence Gas Company ("Lawrence"), a subsidiary company, to Springfield Gas Light Company

[1] Holding Company Act Release No. 18149 (October 31, 1973).

[2] Rule 21(a) of our Rules of Practice permits a petition for rehearing but a petition for rehearing is not preconditioned to appellate review of a Commission order under Section 24(a) of the Act.

("Springfield"), an exempt holding company under Rule 2 of the Act. The sale of Lawrence to Springfield was consummated on November 14, 1973, effective as of October 31, 1973, in accordance with the provisions of the plan, as amended.

Originally, Springfield contemplated acquiring Lawrence and merging it into either Springfield or Northhampton Gas Light Company, (renamed Bay State Gas Company ("Bay State")), a wholly-owned subsidiary company of Springfield. However, on advice of tax counsel Springfield rearranged the form of acquisition so that Springfield and Bay State were merged concurrently with the acquisition of Lawrence, leaving Bay State as the surviving company and Lawrence as its sole subsidiary. The acquisition of Lawrence, whether by Springfield or Bay State, is not subject to Sections 9(a) (2) and 10 of the Act. Bay State, the surviving company, is, like its predecessor, Springfield, an exempt holding company. Notice of the proposed sale of Lawrence, issued March 14, 1973, (Holding Company Act Release No. 17906) gave any interested person until April 9, 1973, to request in writing that a hearing be held. In accordance with Rule 23(e) the notice specified that any person requesting a hearing shall state the reason for such request and the issues of fact or law raised by the plan which he desires to controvert. On April 9, 1973, AMC filed a request for hearing, an application to intervene therein, and a motion to consolidate the Springfield proceeding with another case in which a hearing had already been granted.

The other proceeding with which AMC sought consolidation involved the proposed sale of three NEES gas utility subsidiary companies, Lynn Gas Company ("Lynn"), Mystic Valley Gas Company ("Mystic Valley") and North Shore Gas Company ("North Shore") and Massachusetts LNG, Inc., ("Mass. LNG"), a gas storage company, to Eastern Gas and Fuel Associates ("Eastern")

the parent of Boston Gas Company ("Boston Gas"). A concurrent purchase of the assets of these gas utility companies and of the stock of Mass. LNG by Boston Gas was to be effected so that a single gas utility company would survive. AMC and others had requested a hearing on this proposed sale to Eastern. AMC's request for a hearing set forth in detail the issues of fact and law which it desired to controvert as prescribed in our notice of the proposed sale and in Rule 23(c). AMC cited five issues supported by factual allegations on which it claimed a hearing would be warranted. We ordered a hearing on that sale. AMC was allowed limited participation at the hearing in accordance with our Rules of Practice, and its counsel participated from time to time in the proceeding which lasted over seven weeks. The hearing was terminated when AMC and others settled their controversy with Eastern and NEES and withdrew from the proceeding, as noted in our Memorandum Opinion and Order of October 25, 1973, approving the sale of the NEES subsidiary companies.[3]

Although on April 9, 1973, AMC also requested a hearing on the proposed sale of Lawrence to Springfield, it did not specify reasons warranting a hearing on that particular transaction or state the particular issues of law and fact it desired to controvert. Aside from a general contention that the two sales should be heard together, AMC stated only: "[W]e request you to hold a public hearing on this matter which is subject to many of the same objections we raised against the proposed sale of Lynn, North Shore and Mystic Valley to Boston Gas."[4]

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[3] Holding Company Act Release No. 18133 (October 25, 1973).

[4] This request appears in a prior letter of AMC to the Administrative Law Judge, dated March 29, 1973, annexed to the application as Appendix B. The request for hearing on the Eastern sale referred to was annexed as Appendix A. The application of April 9, 1973, itself was directed primarily to identifying AMC and arguing for consolidation of the two proceedings.

On October 31, 1973, six days after authorizing the Eastern sale, we issued our Memorandum Opinion and Order which authorized the sale of Lawrence.[5] We denied AMC's request for a hearing because AMC had not presented any reasons to justify its request.

This deficiency is more than a matter of form. A hearing is not ordered as a matter of course nor are we required to grant it merely because it has been requested.[6] A hearing is a means of ascertaining the facts necessary to reach a decision on legal issues in the proceeding. If a request for a hearing fails to specify the issues of fact or law which it is desired to controvert and the reasons why evidence must be taken to resolve such controversies, no issue has been drawn to define the scope of such hearing. Accordingly, in accordance with our established practice, our notice in this proceeding expressly required such specification.[7] This procedure makes good administrative sense and at the very least serves to screen out requests for hearings on vague, unsubstantial or immaterial issues. Without it, a hearing may be futile or turned into a search for issues rather than an effective exploration of issues specifically identified and properly noticed.

AMC cannot expect us to determine for it which of the "many" reasons it had specified in opposition to the proposed sale to Eastern had some relevance to the proposed sale of Lawrence and to recast them into issues to be heard in the latter proceeding. Pleading by allusion is no substitute for the direct and explicit statement that we have required as this very case demonstrates. Even con-

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[5] The price paid for NEES' stock interest was $6,638,000 or 183% of the book value. The minority stockholding of Lawrence will be paid the same price.

[6] See *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 762 (1973).

[7] Holding Company Act Release No. 17906 (March 14, 1973). *Cf.* Rule 23(e) and Rule 23(c).

strued with the utmost liberality, AMC's request would not justify a hearing on the Lawrence sale.

It is clear that many of the AMC objections to the Eastern acquisition could in no way be applicable to the proposed Springfield acquisition. AMC objected to the proposed merger of Lynn, Mystic Valley and North Shore into Boston Gas, Eastern's subsidiary, because of Eastern's substantial stock interest in Algonquin Gas Transmission Company, Boston's supplier of pipeline natural gas. Springfield, on the other hand, receives its pipeline gas from Tennessee Gas Transmission Company with which it has no corporate affiliation.

Another AMC objection dealt with the alleged increment of market control by Boston Gas if it were allowed to merge with the three former NEES companies. Geographically, the utility properties to be acquired by Boston adjoined its existing territory and shared with it gas service to metropolitan Boston. In contrast, Lawrence and Springfield serve distinct areas of Massachusetts. AMC cited statistics showing an increase in Boston Gas customers, after the merger, from 338,680 on January 1, 1972, or 31.68 percent of all Massachusetts private utility gas customers, to 515,295 customers, or 48.20 percent. No statistics were cited by AMC to show the respective market share or number of customers for Springfield, Bay State and Lawrence. However, the record shows that as of January 1, 1972, Springfield had 67,849 customers, Bay State had 8,000 customers and Lawrence had 32,791 customers. Obviously, the aggregate market share for Springfield and Bay State, assuming a combination with Lawrence, is in no way comparable to that of Boston Gas.

In its petition for rehearing AMC seeks to restate its objections to the Springfield sale. It is now alleged, for the first time, that, in terms of market concentration,

Springfield should not be considered as a single and isolated utility company. Springfield is related to a group of other utilities through common executive personnel,[8] and it is now urged that the effect of the Lawrence sale to Springfield should be considered in this larger administrative context.

The statutory relevance of these new allegations is by no means clear, but there is no need to pursue this issue now. For present purposes it is sufficient to note that these allegations were not even remotely suggested by AMC's original objections. In fairness to all concerned we do not deem it proper to reconsider the Lawrence sale, which has been consummated pursuant to our order, on the basis of a novel issue of doubtful merit or relevance that AMC has now presented to us for the first time.[9]

We could and did read AMC's original request for hearing as raising an issue as to the maintenance of competitive conditions in the efforts by NEES to sell these companies. The bidding itself, the evaluation of the bids and

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[8] For many years, Springfield Gas Company, Fitchburg Gas and Electric Light Company, Brockton-Taunton Gas Company (Massachusetts) Concord Electric Company and Exeter and Hampton Electric Company (New Hampshire) and Orange and Rockland Utilities, Inc. (New York), an exempt holding company with subsidiaries in adjacent portions of New Jersey and Pennsylvania, have shared executive offices and certain other administrative services.

[9] AMC's statement that as a result of the sale Lawrence is transferred from one combination gas and electric utility holding company to another is unfounded. Springfield is not part of a statutory holding-company system, and none of the companies with which it has any administrative relationships conduct an electric utility business in Lawrence. The sale of Lawrence effectively separates its gas business from the electric service that NEES provides in that area.

the preparatory discussions NEES conducted with all prospective bidders involved Lawrence as well as Lynn, Mystic Valley and North Shore. It had to because NEES had offered, as one bidding alternative, the sale of all four companies together. Because this issue was necessarily identical on both sales, we deferred action on the Lawrence sale until a full exploration of the bidding procedure was completed in the Eastern hearing. If any irregularities were to be uncovered, AMC's counsel had ample opportunity to uncover them in the seven weeks of hearings on the Eastern acquisition. Having found after a full hearing that the procedures adopted by NEES maintained competitive conditions in sufficient measure to satisfy Section 12(d) and Rule 44,[10] we saw no need for another hearing for the purpose of again reviewing the same subject.

From AMC's original request and from its present motion for rehearing, it appears that AMC's main objective was to consolidate for hearing the two proceedings. They dealt with the sale of different properties to different purchasers at different prices, and, except for the question of the bidding procedure, the governing facts were not interrelated. We adhere to the original determination that consolidation would have encumbered each proceeding and purchaser with questions and proof foreign to the expeditious disposition of the particular transaction involved.

AMC also takes exception to our determination that an acquisition of the stock of a utility company with a concurrent liquidation or merger of the company acquired should be considered, under the Act, as an acquisition of assets rather than as an acquisition of utility securities. It requires no argument to show that this interpretation correctly reflects the substance of the transaction being

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[10] Holding Company Act Release No. 18133 (October 25, 1973).

examined. The acquisition of the stock is simply a method of transferring title to the assets. We have not been presented with any persuasive reasons to change our long standing interpretation of Section 9(a) (2).[11]

It appears that there was an inadvertent failure to serve AMC with the Order of October 31, 1973, authorizing the Lawrence sale. The motion for leave to file the petition for rehearing out of time is granted.

For the reasons set forth above, the petition for rehearing is denied.

By the Commission.

/s/ GEORGE A. FITZSIMMONS
George A. Fitzsimmons
*Secretary*

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[11] *Crescent Public Service Company*, 22 S.E.C. 426, 432 (1946). The same rule is well established in tax law. *Cf. Ashland Oil & Refining Corp.* v. *Commissioner*, 99 F.2d 588 (C.A. 6, 1936), *cert. den.*, 306 U.S. 661; *Kanawaha Gas & Utilities Co.* v. *Commissioner*, 214 F. 2d 685, 691 (C.A. 5, 1954).

## APPENDIX B

### PUBLIC UTILITY HOLDING COMPANY ACT OF 1935*

### TITLE I—CONTROL OF PUBLIC UTILITY HOLDING COMPANIES

#### Necessity for Control of Holding Companies

SEC. 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors on the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of elec-

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* Approved August 26, 1935, 49 Stat. 803, 15 U.S.C. 79a et seq. Only Title I of this Act is printed herewith. Title II containing the amendments of the Federal Water Power Act is administered by the Federal Power Commission. (Note. See p. 29.)

tric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utilty companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and op-

eration or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

Definitions

SEC. 2. (a) When used in this title, unless the context otherwise requires—

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(11) "Affiliate" of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

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## Acquisition of Securities and Utility Assets and Other Interests

SEC. 9. (a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate, under clause (A) of paragraph (11) of subsection (a) of section 2, of such company and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

(b) Subsection (a) shall not apply to—

(1) the acquisition by a public-utility company of utility assets the acquisition of which has been expressly authorized by a State commission; or

(2) the acquisition by a public-utility company of securities of a subsidiary public-utility company thereof, provided that both such public-utility companies and all other public-utility companies in the same holding-company system are organized in the same State, that the business of each such company in such system is substantially confined to such State, and that the acquisition of such securities has been expressly authorized by the State commission of such State.

(c) Subsection (a) shall not apply to the acquisition by a registered holding company, or a subsidiary company thereof, of—

(1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, or political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing;

(2) such other readily marketable securities, within the limitation of such amounts, as the Commission may by rules and regulations prescribe as appropriate for investment of current funds and as not detrimental to the public interest or the interest of investors or consumers; or

(3) such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

Approval of Acquisition of Securities and Utility Assets and Other Interests

SEC. 10. (a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting-trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof, or its reations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may

be required under section 5 from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any othe interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the ap-

plicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Notwithstanding the provisions of subsection (b), the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 8 or is detrimental to the carrying out of the provisions of section 11; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets,

as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 11.

Simplification of Holding-Company Systems

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commis-

sion shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantage of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such hold-

ing company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as

sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall

approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commision as trustee or receiver without notifying the Commision and giving it an opportunity to be heard before making any such otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such

rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding shall be subject to approval by the Commission.

(g) It shall be unlawful for any person to solicit or permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or any subsidiary company thereof under this section, or otherwise, or in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

(1) the plan has been proposed by the Commission, or the plan and such information regarding it and its sponsors as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers has been submitted to the Commission by a person having a bona fide interest (as defined by the rules and regulations of the Commission) in such reorganization;

(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for a hearing on the plan and other plans submitted to it, or by an abstract of such report made or approved by the Commission; and

(3) each such solicitation is made not in contravention of such rules and regulations or orders as the

Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

Nothing in this subsection or the rules and regulations thereunder shall prevent any person from appearing before the Commission or any court through an attorney or proxy.

## APPENDIX C

CHAIRMAN

PAUL G. GITLIN
EXECUTIVE SECRETARY

# The Commonwealth of Massachusetts
## Consumers' Council

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston 02202

October 1, 1975

The following resolution was adopted by unanimous vote of the Massachusetts Consumers' Council at its regularly scheduled monthly meeting of September 11, 1975.

Resolved:

That the Massachusetts Consumers' Council urge the Association of Massachusetts Consumers to continue and pursue its challenge to the merger of Lawrence Gas with Springfield Gas (now Bay State Gas) and explore all avenues of appeal, including the Supreme Court, in order to force resolution of the public interest considerations involved in the creation of bigger and bigger utility combinations in Massachusetts.

A true copy attested by: Paul G. Gitlin

Paul G. Gitlin, Executive Secretary

NOTARY PUBLIC: Barbara C. Moran

MY COMMISSION EXPIRES
MAY 28, 1982

## APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; WILLIAM L. SPRINGER, and JOHN H. HOLLOMAN III.

Docket No. ID-1316
GEORGE A. CARLSON

Docket No. ID-1643
THOMAS W. SHERMAN

Docket No. ID-1599
JAMES F. SMITH

Docket No. ID-1095
CHARLES H. TENNEY II

### Order To Show Cause

(Issued September 15, 1975)

By order issued October 24, 1957, George A. Carlson (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Assistant Treasurer—Fitchburg Gas & Electric Light Company

Assistant Treasurer—Rockland Light & Power Company

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

By order issued November 26, 1971, Thomas W. Sherman (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Assistant Treasurer—Orange & Rockland Utilities, Inc.

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

Assistant Treasurer—Fitchburg Gas & Electric Light Company

By order issued August 2, 1972, James F. Smith (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Director, Vice President, Treasurer and Assistant Secretary—Orange & Rockland Utilities, Inc.

Director, Vice President, Treasurer and Assistant Secretary—Rockland Electric Company

Director, Vice President, Treasurer and Assistant Secretary—Pike County Light & Power Company

Director and Vice President—Fitchburg Gas and Electric Light Company

By order issued February 18, 1964, Charles H. Tenney II (Applicant) was authorized pursuant to Section 305(b) of the Federal Power Act to hold the following positions:

Chairman of the Board of Directors, Director—Orange & Rockland Utilities, Inc.

Chairman of the Board of Directors, Director—Pike County Light & Power Company

Chairman of the Board of Directors, Director—Rockland Electric Company

Chairman of the Board of Directors, Director—Fitchburg Gas & Electric Light Company

In each of the aforementioned orders, the Commission reserved the right to require Applicants to make further showings that neither public nor private interests would be adversely affected by the continued holding of the above-named positions.

Persons are prohibited by Section 305(b) of the Federal Power Act from holding interlocking board of directors and officers positions in two or more utilities unless they demonstrate that such holding is not adverse to public or private interests. In the past, the Commission has generally authorized the holding of interlocking positions between companies which are under common ownership, which have adjoining territories, and which operate as a single integrated utility system, as in the case of utilities within the Orange & Rockland Group.[1] However, the Applicants hold positions which interlock both within the Orange & Rockland Group and with companies outside[2] the Orange and Rockland Group. The Commission has not granted authorization for persons to hold interlocking positions which extend outside a group of utilities which operate as an integrated utility system, except in the case of the applicants all of whom are associated with the so called "Tenney Group"[3].

Based upon a Staff investigation of the "Tenney Group" arrangement, the Commission has determined that the present holding of interlocking positions which extend to utilities outside the Orange & Rockland Group may be adverse to public or private interests insofar as Orange & Rockland and subsidiaries are concerned because:

---

[1] Utilities involved in the Orange & Rockland Group arrangement are: Orange & Rockland Utilities, Inc., and its subsidiaries, Rockland Electric Company, and Pike County Light & Power Company. These companies are subject to Commission jurisdiction.

[2] Tenney Group companies outside the Orange & Rockland Group: Fitchburg Gas & Electric Company (subject to Commission jurisdiction), Brockton Taunton Gas Company, Concord Electric Company, Exeter and Hampton Electric Company, and Bay State Gas Company.

[3] "Tenney Group": Provides management and other services to the group of utilities listed in footnotes 1 & 2, notwithstanding the fact that the number of shares of voting stock owned directly or indirectly in each company is relatively small.

(1) Orange & Rockland Utilities and subsidiaries no longer should be considered a small utility and the complexity of its operation warrants full time executive management by its officers and directors;

(2) Support of offices in Boston by Orange & Rockland Utilities and subsidiaries as an integral part of sharing the talent of certain key executives appears no longer to be justified by any reciprocal benefits to Orange & Rockland and its subsidiaries;

(3) Orange & Rockland Utilities and subsidiaries while sharing its top executives with other utilities encountered serious financial problems much earlier than the onset of financial problems in the electric utility industry and these problems were attributable in part to deficiencies which relate to:

(a) management of reported earnings beginning as early as 1968 through accounting changes while avoiding requests for rate increases;

(b) actions related to arrangements for construction and operation of the Bowline Generating Station on a joint ownership basis with Consolidated Edison Company; and

(c) administration of joint-use of pole arrangements with telephone utilities and cable television operators.

Notwithstanding the size and complexity of the operations of Orange & Rockland and subsidiaries, the "Tenney Group" arrangement calls for four persons in executive management positions to be located in Boston apart from Orange & Rockland's main office in Spring Valley, New York and to devote only part of their time to the affairs of Orange & Rockland and subsidiaries.

In addition, Charles H. Tenney II as Chairman of the Board of Directors for Orange & Rockland Group Companies and other Companies participating in the "Tenney

Group" arrangement received in 1973 a total salary of $158,417.00, of which 42% or $65,750.00 was borne by Orange & Rockland Utilities and subsidiaries. For the year 1973 Orange & Rockland Utilities and subsidiaries had operating revenues totaling approximately $123.4 million. Accounting to a report published by Commonwealth Management Consultants,[4] the median salary for the highest paid top executive of a company having revenues in the range of $123.4 million was between $70,000 and $80,000, or about one-half of the effective annual rate paid Charles H. Tenney II by Orange & Rockland and subsidiaries. Absent a showing of special circumstances, there would appear to be no justification for Applicant to receive a salary substantially in excess of the levels paid other utility executives reported in the survey.

*The Commission finds:*

In view of the foregoing, it is necessary and appropriate for the purpose of administering the Federal Power Act that the Applicants show cause, if any there be, why the Commission should not terminate the present authority to hold the interlocking positions referred to above.

*The Commission orders:*

(A) George A. Carlson, ID-1316, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Assistant Treasurer—Fitchburg Gas & Electric Light Company

Assistant Treasurer—Rockland Light & Power Company
Assistant Treasurer—Rockland Electric Company

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[4] The published results of a study of executive salaries by Commonwealth Management Consultants for the year 1971. The survey on which the results were based included executives in 77 electric, gas, combination and pipeline utility companies.

Assistant Treasurer—Pike County Light & Power Company

would be adverse to public or private interests and should be terminated.

(B) Thomas W. Sherman, ID-1643, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorizations to hold the following interlocking positions.

Assistant Treasurer—Orange & Rockland Utilities, Inc.

Assistant Treasurer—Rockland Electric Company

Assistant Treasurer—Pike County Light & Power Company

Assistant Treasurer—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

(C) James F. Smith, ID-1599, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Director, Vice President, Treasurer and Assistant Secretary—Orange & Rockland Utilities, Inc.

Director, Vice President, Treasurer and Assistant Secretary—Rockland Electric Company

Director, Vice President, Treasurer and Assistant Secretary—Pike County Light & Power Company

Director and Vice President—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

(D) Charles H. Tenney II, ID-1095, shall show cause, if any there be, on or before October 17, 1975, why the Commission should not find and determine that the continued authorization to hold the following interlocking positions:

Chairman of the Board of Directors, Director—Orange & Rockland Utilities, Inc.

Chairman of the Board of Directors, Director—Pike County Light & Power Company

Chairman of the Board of Directors, Director—Rockland Electric Company

Chairman of the Board of Directors, Director—Fitchburg Gas & Electric Light Company

would be adverse to public or private interests and should be terminated.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
*Secretary.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-607

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR BAY STATE GAS COMPANY IN OPPOSITION

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November 21, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR BAY STATE GAS COMPANY IN OPPOSITION

---

Bay State Gas Company ("Bay State"), an intervenor-respondent in the court below, respectfully urges that the petition for a writ of certiorari be denied for the reasons indicated in this Brief in Opposition.

### QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission ("SEC") was required by the Public Utility Holding Company Act of 1935 ("the Act") to grant

the Association of Massachusetts Consumers ("AMC") a further hearing after AMC's contentions had been aired in a contemporaneous companion case which was settled by all parties including AMC.

2. Whether SEC approval of the divestiture in issue in this case was consonant with the purposes of the Act.

## STATEMENT OF THE CASE

This case involves the divestiture of the gas utilities owned by the New England Electric System ("NEES"), pursuant to the Holding Company Act. The divestiture has already been before the Court on two occasions. Now, however, the Court's mandate has been fully complied with, and further review here would serve no purpose.

Following this Court's order in *SEC* v. *New England Electric System*, 390 U.S. 207 (1968) (*NEES II*), the SEC directed NEES to divest itself of its gas properties. There were eight such properties, which NEES divided into two groups of four, selling the four smaller companies first. Sale of the four smaller companies is not pertinent to this case. The second group of four included Lawrence Gas Company ("Lawrence"). Springfield Gas Light Company ("Springfield") was the successful bidder for Lawrence. Springfield was merged into its former subsidiary, Bay State, on whose behalf this brief is submitted. Boston Gas Company ("Boston Gas"), a subsidiary of Eastern Gas & Fuel Associates ("Eastern"), was the successful bidder for the other three companies.

After completion of the bidding, the SEC commenced proceedings with respect to the two sales of this second group of NEES gas properties. The Eastern proceed-

ing was noticed by the SEC on February 5, 1973. AMC sought and was granted leave to intervene in that proceeding on March 30, 1973.

The present case, involving the divestiture of Lawrence, was noticed by the SEC on March 14, 1973. Public Utility Holding Company Act Release ("HCAR") No. 17906 (March 14, 1973). On April 9, 1973, AMC requested leave to intervene in the Lawrence proceeding, urged that a hearing be held and asked that the Lawrence proceeding be consolidated with the Eastern proceeding. The reasons set forth in AMC's request for a hearing in the Lawrence case were identical with those contained in its petition to intervene in the Eastern proceeding before the SEC. NEES filed an answer on April 18, 1973 in opposition to AMC's request for intervention and a hearing in the Lawrence proceeding, to which AMC filed no reply. The SEC took AMC's requests under advisement pending the conclusion of the Eastern proceeding. HCAR No. 18254 (Jan. 11, 1974), at 4.

During the summer of 1973, a hearing was held in the Eastern case in which a record of more than 2,000 pages was developed, with the full participation of AMC. AMC subsequently withdrew from the Eastern proceeding pursuant to a settlement agreement dated August 17, 1973, in which Boston Gas agreed to certain limited restrictions on its future activities.

Determining that AMC's request disclosed no reason to hold a hearing as to the Lawrence divestiture, the agency entered an order approving the sale by NEES of its Lawrence shares to Springfield and denied a hearing and consolidation. The Lawrence sale was consummated on November 14, 1973 and Spring-

field was merged into its wholly-owned subsidiary, Bay State, on the same day, in accordance with the order of the Commission. On December 4, 1973, AMC filed a request for rehearing raising new issues which are the ones it primarily seeks to press on review in this Court, namely, the alleged anticompetitive effects of the divestiture and the applicability of Section 9(a)(2). The SEC denied rehearing and other relief requested on January 11, 1974. HCAR No. 18254 (Jan. 11, 1974).

On review, the District of Columbia Circuit, Rives, McGowan and Wilkey, JJ., affirmed. The court held that (1) the SEC's refusal to consolidate the Eastern and Lawrence proceedings was a sound exercise of discretion and (2) AMC had failed to state its contentions concerning the new issues raised in its motion for rehearing with the degree of specificity required by the SEC's Rules of Practice. The court also held (3) that NEES had made sufficient progress to satisfy the divestiture order even though it did not complete the process until after the two-year deadline in the order had expired. Finally, the Court of Appeals (4) found no error in the SEC's use of findings from the Eastern case in disposing of AMC's request for a hearing in the Lawrence proceeding, and (5) rejected AMC's hyper-technical contention that the essentially simultaneous merger of Springfield into the corporate predecessor of Bay State and its purchase of Lawrence gave rise to a requirement for SEC approval under Section 9(a)(2) of the Act. In passing, the lower court also rejected AMC's contention that the sale of Lawrence to Bay State was anticompetitive and therefore contravened the Act because Bay State had common directors and officers with other utilities.

As an appendix to the petition for certiorari, AMC has included a document dated October 1, 1975 (after the date of the decision of the court below) reproducing a resolution of the Massachusetts Consumers Council urging AMC to exhaust all available avenues of appeal "in order to force resolution of the public interest considerations involved in the creation of bigger and bigger utility combinations in Massachusetts." Passing over the irrelevance of this document, and the inappropriateness of its inclusion in the petition, *see* S.Ct.R. 40(5), its presence makes it particularly important for the Court to be aware of AMC's unexplained failure to exhaust the remedies that were clearly available to it under the law of Massachusetts.

The acquisition by Springfield of the interest in Lawrence formerly held by NEES, as well as the merger of Springfield into Bay State, required approval of the Massachusetts Department of Public Utilities ("the DPU") under Sections 17A, 96 and 99 of Chapter 164 of the General Laws of the Commonwealth of Massachusetts. Springfield, Bay State and Lawrence filed a joint application for such approval on July 5, 1973. After providing due notice by publication in local newspapers in the service areas of Springfield and Lawrence, the DPU conducted a public hearing on September 5, 1973. No representatives of AMC appeared or participated, although AMC representatives had been present as observers at the DPU's hearings on the acquisition of the three NEES utilities by Boston Gas. Evidence was presented by Springfield to show that the Lawrence acquisition and related mergers were in the public interest, including evidence showing that the rate structures of the three companies involved in the sale (Lawrence, Bay State,

and Springfield) were approximately equal and that the fear expressed by AMC in the Eastern proceeding, that Boston Gas' higher rates would be visited upon consumers in the service areas of the acquired companies, was not a valid consideration in the Lawrence proceeding.

Although AMC had notice of and opportunity to be heard in the DPU proceeding, it chose not to participate or even observe. In contrast, an individual representing consumer interests did appear and offered a statement which was received in the record. The Massachusetts statute (Ch. 164, § 96) gives the DPU power to reject a merger if it is not in the public interest, which was the gravamen of petitioner's claim below.

After the hearing, the DPU approved the transactions as consistent with the public interest. The DPU found that the results would include "more effective use of the gas supply and distribution capabilities," and "cost savings, operating efficiencies and service improvements." Mass. DPU Order No. 17726, at 6.[1]

The DPU's decision approving both the merger of Springfield into Bay State and the acquisition of Lawrence was the subject of an appeal by members of the public to the Supreme Judicial Court of Massachusetts. That appeal was commenced but not perfected. AMC again did not participate.

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[1] A supplemental petition was filed on November 5, 1973 for certain additions and revisions in the DPU order required because the Internal Revenue Service did not issue the requested ruling permitting tax-free treatment of the original plan to merge both Springfield and Lawrence into Bay State. After a further hearing, the DPU issued a supplemental order approving the modifications on November 13, 1973. As recast for tax purposes, approved and effected, the transaction did not provide for merger of Lawrence into the survivor of the Bay State-Springfield merger.

## ARGUMENT

### I.

### The Decision Below and the Action of the SEC Were in Conformity with the Public Utility Holding Company Act of 1935.

This case involves the final stage of the divestiture of the gas utility holdings of NEES pursuant to Section 11 of the Act. 15 U.S.C. § 79k (1970).[2] In this part of the brief, we will show that the actions of the SEC and the court below were in full compliance with this Court's rulings in the two prior *NEES* cases,[3] and that the case is not one that calls for an exercise of the certiorari jurisdiction. We will also demonstrate that any delay by NEES in complying with the SEC's order requiring divestiture was not prejudicial to AMC. Finally, we will show that the SEC properly held that Springfield's acquisition of NEES' interest in Lawrence was not subject to SEC approval under Section 9(a)(2) of the Act. 15 U.S.C. § 79i(a)(2) (1970).

Little need be said concerning this Court's prior decisions in *NEES I* and *NEES II*. In the first of

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[2] A separate case, In re New England Elec. System, Civil No. 74-2466-M (D.Mass., filed July 1, 1974), was initiated by the SEC under Section 11(e) of the Act to "enforce and carry out the terms and provisions of" the divestiture plan. On September 15, 1975, the District Court, Murray, J., entered an order approving the plan. Counsel for all parties have agreed that the issues in the District of Massachusetts "do not relate to or conflict with" the issues here on review, and that "the interests of the minority shareholders of Lawrence Gas Company would not be affected by a decision rendered" in the instant case.

[3] SEC v. New England Elec. System, 384 U.S. 176 (1966) (*NEES I*); SEC v. New England Elec. System, 390 U.S. 207 (1968) (*NEES II*).

those cases the Court upheld the SEC's test for determining whether "loss of substantial economies" can be avoided by permitting a holding company to control a second integrated public utility system under Section 5 of the Act. 15 U.S.C. § 79e (1970). In the second case, the Court, following a remand to the First Circuit, upheld the SEC's divestiture order, finding that it was supported by the requisite "substantial evidence." *Id.* § 79x(a). The result was a final remand to the First Circuit with instructions to affirm the SEC's divestiture order. The Court of Appeals entered such an affirmance, and the order stood approved. All of the SEC's subsequent actions with regard to the divestiture of NEES' gas holdings have been pursuant to that litigation and consistent with this Court's decisions. Sale of NEES' interest in Lawrence was part of the plan submitted by NEES to the Commission. The decisions in *NEES I* and *NEES II* are by no means irrelevant to the case at bar, for they highlight the deference this Court has given to the SEC's expertise in the administration of the Act.

The Act requires, in Section 11(e), that divestiture orders be complied with in no more than two years. 15 U.S.C. § 79k(e) (1970). Here, admittedly, a longer period elapsed between the SEC's order and the submission of NEES' voluntary plan for divestiture, but the record is devoid of any evidence that AMC has been prejudiced thereby. AMC nevertheless has argued that the voluntary plan submitted by NEES should now be abandoned, and that the SEC should impose a plan under Section 11(d) of the Act. 15 U.S.C. § 79k (d) (1970). That argument was properly rejected by the court below, 516 F.2d at 716, on the basis of the

progress made by NEES within the statutory two-year period "and the Commission's satisfaction with the final plan." Plainly, a remand to compel the SEC to impose a plan under Section 11(d) that would accomplish the same purposes as the voluntary plan the Commission has already received and found satisfactory under Section 11(e) would be a case of "marching the king's men up the hill and then marching them down again . . . ." *City of Yonkers* v. *United States*, 320 U.S. 685, 694 (1944) (Frankfurter, J., dissenting). A remand for such a vain purpose hardly seems consistent with AMC's expressed concern over the amount of time the NEES divestiture has already consumed.

Moreover, as pointed out in *Phillips* v. *SEC*, 185 F.2d 746, 750 (D.C.Cir. 1950), treating the two-year period of Section 11(e) as "a trap closing down relentlessly . . . might well tend to cause the Commission to refrain from issuing any order in a particular case until the situation became ripe for complete and immediate enforcement." Hence, the rigid interpretation placed on Section 11(e) by AMC might, rather than stirring the SEC to more strenuous application of the Act, have precisely the opposite result.

Acting pursuant to Section 11(e) of the Act, 15 U.S.C. § 79k(e) (1970), the SEC approved the procedures utilized by NEES in disposing of its gas properties, including Lawrence. AMC argues, however, that the SEC was required to go further, and consider the merits of the overall transaction by which NEES' interest in Lawrence was sold to Springfield, and Springfield was merged into its subsidiary, Bay State. Such approval would only be necessary if the transaction were within the ambit of Section 9(a)(2) of the Act. 15 U.S.C. § 79i(a)(2) (1970).

Under Section 9(a)(2) the SEC must approve the purchase by any person (using jurisdictional means)[4] of "any security of any public-utility company, if such person is an affiliate," as defined in Section 2(a)(11)(A), of both the company whose shares are being purchased "and of any other public utility holding company, or will by virtue of such acquisition become such an affiliate." Procedures for approval are set forth in Section 10. 15 U.S.C. § 79j (1970). In the instant case, AMC contends that the acquisition of Lawrence by Springfield constituted an acquisition of the securities of Lawrence by a company which already had an "affiliate" and thereby obtained a second "affiliate," *id.* § 79b(a)(11)(A), triggering the approval requirement established by the initial clause of Section 9.

AMC's interpretation of Section 9(a)(2) ignores both the statutory purpose and the practical realities of the transaction. The SEC and the Court of Appeals took both into account.

The purpose of Section 9(a)(2) is to prevent any person from owning 5% or more of the voting securities of two or more public utility companies unless the ownership of such securities of the second and any additional affiliates has been found to comport with the public interest as set forth in Section 10 of the Act. That purpose is not contravened by the transaction here on review.

Reduced to its essentials, in this transaction, Springfield, a company with one statutory "affiliate" (Bay State), purchased NEES' interest in Lawrence, which thereupon became its "affiliate." As part of the same

[4] *I.e.*, "use of the mails or any means or instrumentality of interstate commerce."

transaction, Springfield and Bay State were merged, leaving no dual affiliation within the meaning of Section 9(a)(2). Viewing the transaction as a whole, Bay State emerged with the single affiliate permitted under the Act. Clearly, if Springfield had merged into Bay State a month, a week, or a day prior to the acquisition of the Lawrence shares, AMC could not have even argued that Section 9(a)(2) applied. The mere fact that the transaction was accomplished concurrently because of tax and business reasons does not provide a sound basis for the application of that provision.

Petitioners seek to freeze the transaction at an artificial time, in a vain attempt to show that Springfield was, for a *scintilla juris*, a statutory affiliate of both Lawrence and Bay State. The artificiality of this approach conflicts with the philosophy that underlies the Commission's "task of giving an intricate statutory scheme practical sense and application."[5]

In contrast, SEC's approach was a practical and realistic one: to look at the condition of the parties both before and after the transaction has been consummated. In this case, prior to the acquisition-and-merger, Bay State had one affiliate, Springfield, of which it was a wholly-owned subsidiary. Following the transaction, the NEES interest in Lawrence was held by Bay State, and Springfield had disappeared from the picture, having been merged into Bay State. In short, the only remaining statutory affiliate of Bay State was and is Lawrence. The substance of the transaction

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[5] SEC v. New England Elec. System, 384 U.S. 176, 184 (1966) (*NEES I*), *citing* Power Reactor Dev. Co. v. Int'l Union, Elec. Workers, 367 U.S. 396, 408 (1961); Philadelphia Co. v. SEC, 177 F.2d 720, 725 (D.C.Cir. 1941).

thus involves no proliferation of corporate tiers of the sort the Act was designed to prevent.[6]

As the court below observed, in expressly approving the SEC's analysis of this issue,

> In assessing interrelated corporate adjustments, comparison should be made of the situation just prior to and immediately following the adjustments. The sequence of relatively simultaneous corporate adjustments whose order has no practical effect do [sic] not govern the applicability of section 9(a)(2). 516 F.2d at 717.

Any other result would exalt form over substance, and would run counter to the policy expressed in *NEES I* and *NEES II* of deference to the SEC's judgments in matters within its area of expertise.

The petition also asserts that because there were common directors and officers among several utility companies including Bay State, Bay State's purchase of NEES' interest in Lawrence offended the principles of Section 10(b) of the Act. Petition at 8-9. This contention falls wide of the mark, for as noted by the court below, the "[e]limination of common officers and directors in noncompeting utility companies was not the precise purpose of the Act." 516 F.2d at 717.[7]

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[6] *See* S.Rep.No. 621, 74th Cong., 1st Sess. 31 (1935).

[7] Moreover, events have in large measure overtaken AMC's position. In response to a Federal Power Commission show cause order—an order that is not here on review but is reprinted in full as an Appendix to the Petition—three of the respondents have resigned one or more of their corporate posts, and the fourth has stated his intention to do so at the conclusion of his term of office in 1976. N.Y. Times, Oct. 4, 1975, at 33, col. 5 & 40, col. 8; Wall St. J., Oct. 6, 1975, at 15, col. 5.

AMC's case, then, reduces to its bald assertion that the battle for consumerism must be fought over the Lawrence divestiture. This claim has a hollow ring, given AMC's unexplained failure to exhaust the remedies that were available to it before the competent State agency. Since there is no conflict between the decision below and this Court's prior decisions in *NEES I* and *NEES II*, and no "special and important reasons" for review in this Court, S.Ct.R. 19(1), certiorari should be denied.

## II.

### The Petitioners Were Afforded a Full and Fair Hearing on Their Contentions in a Companion Adminsitrative Case

As may be seen from a review of the opinion of the Court of Appeals, the decision below rests in large measure on essentially procedural grounds involving the application of familiar doctrines of administrative law. The failure to show any prejudice from the treatment afforded AMC is, in our view, fatal to the petition for certiorari. AMC had an opportunity to ventilate its concerns in the Eastern proceeding. It did so (before joining in the settlement of that case), and cannot be heard now to complain that—in Judge Rives' words—it would have "tried harder" if it had known that that would be its only opportunity. 516 F.2d at 716. Moreover, the SEC's actions in refusing to order consolidation of the Lawrence and Eastern proceedings, and relying on the record made in the latter proceeding (to which AMC was a party) were plainly correct.

The denial of AMC's requests for a rehearing and consolidation may be treated summarily. Under established precedents, agency action of this nature may be upset only upon a clear showing of abuse of discre-

tion. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946) (denial of rehearing); *American Trucking Ass'ns* v. *United States*, 326 U.S. 77 (1945) (denial of consolidation); *City of San Antonio* v. *CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967). AMC has made no showing that these aspects of the SEC's rulings suffered from such a defect.

The request for a hearing was also properly denied. As detailed by the court below, AMC's initial request was exceptionally vague. *See* 516 F.2d at 715. Despite the provision of the SEC's regulations requiring specificity of pleading, 17 C.F.R. § 201.9 (1975), AMC's submittal was an assortment of vague allegations. Although AMC's submittal did refer to the length of the NEES divestiture process and the fairness of the bidding procedures used by NEES for disposal of its holdings, there was no mention of anti-competitive effects or the need for approval under Section 9(a)(2) of the Act. In a document that accompanied the request for a hearing, AMC's president noted that the Lawrence proceeding raised "many of the same objections" as were raised in the Eastern proceeding. In its January 4, 1974 decision the Commission analyzed AMC's contentions from the Eastern case and concluded that none of them were pertinent to the Lawrence case. *See* Petition at 21a-23a. With respect to the Section 9(a)(2) and anti-competitive-effects contentions, the SEC, besides responding to the contentions on the merits, ruled that the former had not been raised in the original request for a hearing, and the latter had already been aired in the Eastern proceeding.

Those rulings, too, were correct. Certainly the SEC could properly demand adherence to reasonable plead-

ing requirements. *See, e.g., BPI* v. *AEC*, 502 F.2d 424 (D.C. Cir. 1974). Moreover, its reluctance to waive those requirements after the transaction had been effected in reliance on Commission approval of the plan, *see* Petition at 23a, was fair and reasonable under the circumstances.

AMC litigated the fairness of the bidding procedures used by NEES in disposing of that company's eight gas utilities. It received a full and fair hearing on that issue in the context of the companion Eastern case, to which it was a party. Although that case resulted in a settlement (in which AMC joined), a substantial record was developed and available to the SEC. The court below well stated the principle that obtains in such circumstances: "The Commission need not hold a hearing to gain information which has already been gathered." 516 F.2d at 716. *See also United States* v. *Pierce Auto Freight Lines, Inc., supra*, at 530. Manifestly, the fact that the SEC referred to a different docket in justifying its denial of a hearing was immaterial since AMC was a party to that proceeding, "offered evidence and had full opportunity to participate in the hearings." *Arizona Pub. Serv. Co.* v. *FPC*, 490 F.2d 783, 784 (D.C. Cir. 1974). To convene another hearing to consider the issue of anti-competitive effects of NEES' bidding procedures would have been an egregious misuse of agency resources, and a waste of the parties' time.

AMC thus received a hearing on its contention that NEES' procedures in dismantling its gas holdings were anti-competitive in the Eastern proceeding. As a result, the SEC properly denied its request for another hearing on the same issue in the Lawrence case (where the same NEES procedures were used). No

showing was made of a need for consolidation of the two cases, and, to the extent that the SEC refused to convene a hearing on any of AMC's other allegations, it was justified in doing so by AMC's failure both to state any relevant claims and to comply with the pleading requirements of the agency's Rules of Practice. As a result, there was no prejudice to AMC in the SEC's disposition of its requests.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-607

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 516 F. 2d 711. The memorandum opinions and orders of the Securities and Exchange Commission ("Commission") issued on October 31, 1973, *New England Electric System*, Public Utility Holding Company Act Release No. 18149, and on January 11, 1974, Public Utility Holding

Company Act Release No. 18254, are set forth at Pet. App. 10a-25a.

## JURISDICTION

The judgment of the court of appeals was entered on July 24, 1975. The petition for a writ of certiorari was filed on October 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission abused its discretion in denying petitioner consumers' association a hearing on the propriety of a sale of a gas utility subsidiary by a holding company registered under the Public Utility Holding Company Act, when the consumers' association failed to raise any specific issues in its application that it had not already raised in a companion proceeding then pending before the Commission.

2. Whether the Securities and Exchange Commission correctly determined that Section 9(a)(2) of the Public Utility Holding Company Act was not applicable to the acquisition of a gas utility company by an exempt holding company that merged with its only existing affiliate at the same time it effected the acquisition.

3. Whether the Securities and Exchange Commission abused its discretion in denying a hearing on the possible anti-competitive effects of the acquisition, when the issue was raised by the consumers' associa-

tion for the first time in a petition for reconsideration of the Commission's order and when the Commission concluded that the objections of the consumers' association did not raise a substantial issue.

## STATUTE INVOLVED

Portions of the Public Utility Holding Company Act of 1935 ("Act"), 49 Stat. 803, 15 U.S.C. 79, *et seq.*, are printed at Pet. App. 26a-40a. Sections 2(a)(7), 2(b), 3(a), and 12(d) of the Act, and Rules 6 and 23(e) of the Commission's rules and regulations under the Act, not there printed, are set forth in the Appendix, *infra*, 1a-6a.

## STATEMENT

In 1964, the Commission entered an order under Section 11(b)(1) of the Act, 15 U.S.C. 79k(b)(1), requiring the New England Electric System ("NEES"), a registered holding company, to divest itself of its gas utility business. *New England Electric System*, 41 S.E.C. 888. Under Section 11(b)(1), a registered holding company is basically limited to a single integrated public-utility system. NEES was predominantly an electric utility holding company, but it also owned eight gas utility subsidiaries, one of which was Lawrence Gas Company ("Lawrence").

The Commission's order requiring NEES to divest its gas business was ultimately affirmed by this Court in 1968.[1] The Act, in Section 11(e), 15 U.S.C. 79k

[1] The Commission's order was initially affirmed in *Securities and Exchange Commission* v. *New England Electric System*,

(e), provides that companies may voluntarily comply with divestiture orders by submitting plans, subject to the Commission's approval, for the sale of stock or assets. Beginning in 1971, NEES filed three such plans. The present action arose out of the third of the Section 11(e) plans filed.

In the first round of negotiations, NEES successfully concluded arrangements to sell four of its gas companies, and the Commission approved the sale on December 30, 1971.[2] At about the same time, NEES commenced formal efforts to find purchasers for its remaining four gas companies, including Lawrence (C.A. App. 43).[3] In its request for bids from prospective purchasers, NEES offered to sell all four of the remaining gas companies to one purchaser or, in the alternative, to accept the most favorable aggregate of separate bids (C.A. App. 45). The combination that resulted in the greatest total consideration to NEES was the bid by Springfield Gas Light Company ("Springfield") for Lawrence alone, together with the bid by Eastern Gas and Fuel Associates ("Eastern") for the other three gas companies and for a non-utility subsidiary of NEES (C.A. App. 7, 52-53).

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384 U.S. 176, reversing 346 F. 2d 399 (C.A. 1), and was reaffirmed in *Securities and Exchange Commission* v. *New England Electric System*, 390 U.S. 207, reversing 376 F. 2d 107 (C.A. 1).

[2] *New England Electric System*, 44 S.E.C. 756.

[3] "C.A. App." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

Since two different purchasers were involved, NEES filed separate applications under Section 11(e) of the Act for the sale of three gas companies and the non-utility subsidiary to Eastern (the "Eastern plan") and for the sale of Lawrence to Springfield (the "Lawrence plan") (C.A. App. 1-79; 109-143). It was contemplated in connection with the latter plan that Springfield would simultaneously merge with its only subsidiary, Northampton Gas Light Company ("Northampton"), to form a new entity, Bay State Gas Company ("Bay State") (C.A. App. 126-127).[4] Notices giving interested persons the opportunity to request hearings on the two plans were issued by the Commission on February 5, 1973,[5] and March 14, 1973,[6] respectively.

Petitioner Association of Massachusetts Consumers, Inc., and several other interested persons and organizations requested a hearing on the Eastern sale (Pet. App. 19a-20a). In its request, petitioner objected to the combination of Boston Gas Company, owned by Eastern, with the three neighboring gas companies Eastern proposed to buy (C.A. App. 96-101).

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[4] Bay State, like Springfield before it, is *prima facie* an exempt holding company under Section 3(a)(1) of the Act, 15 U.S.C. 79c(a)(1), since it and its public utility subsidiaries "carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized * * *."

[5] *New England Electric System*, Public Utility Holding Company Release No. 17874.

[6] *New England Electric System*, Public Utility Holding Company Release No. 17906 (C.A. App. 80-83).

On March 16, 1973, the Commission granted the requests for hearing, and petitioner was permitted to participate pursuant to Rule 9(c) of the Commission's Rules of Practice, 17 C.F.R. 201.9(c) (Pet. App. 3a, 20a).[7]

Petitioner alone also requested a hearing on the Lawrence plan and moved that any such hearing be consolidated with the hearing that had already been scheduled on the Eastern plan. Unlike its request as to the Eastern sale, however, petitioner did not raise any issue in its application that related specifically to Springfield's acquisition of Lawrence (C.A. App. 87-108). Instead, it merely referred to its objections to the Eastern acquisition and concluded that the Lawrence sale was "subject to many of the same objections * * *" (C.A. App. 102).[8]

The only common factual question raised by the two applications, however, was whether NEES had maintained competitive conditions in accordance with Section 12(d) of the Act, 15 U.S.C. 79*l*(d), in offering the properties for sale (Pet. App. 7a, 23a). The entire competitive process had dealt with all four of the gas utility companies without distinguishing among them. The division of the sale into two

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[7] *New England Electric System*, Public Utility Holding Company Act Release No. 17908.

[8] The principal objections that petitioner had raised to the Eastern plan—the size and pipeline relationships of Boston Gas—were inapplicable on their face to Springfield's purchase of Lawrence, which involved very different facts. See *New England Service System*, Public Utility Holding Company Act Release No. 18254 (Pet. App. 22a).

plans occurred only at the conclusion of this process, when it appeared that the most favorable financial arrangement for NEES was to accept a combination of bids from different purchasers (C.A. App. 52-53). Otherwise the two plans dealt with different properties, different purchasers and different prices. The Commission therefore refused ~~not~~ to consolidate the proceedings and deferred action on the Lawrence plan until the issue of competitive conditions, which was being heard in the Eastern proceeding, was resolved. On October 25, 1973, the Commission approved the phase of the divestiture representing the sale to Eastern (Pet. App. 20a).[9]

At about the same time as the Commission's proceedings on the Eastern sale, the Massachusetts Department of Public Utilities conducted its own inquiry on the proposed purchase of Lawrence and on the merger of Springfield into Northampton to form Bay State. Following a public hearing on September 5, 1973, at which the petitioner did not appear, the Massachusetts DPU approved Springfield's purchase of Lawrence and the contemplated merger, but imposed extensive conditions to protect consumer interests (C.A. App. 126-134). Thereafter, on October 31, 1973, the Commission issued its Memorandum

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[9] While the Eastern proceeding was shortened when all of those opposing the plan withdrew their opposition to Eastern as a purchaser, the Commission independently found, as required by Section 12(d), that competitive conditions with respect to the sale had been maintained. *New England Electric System*, Public Utility Holding Company Act Release No. 18133 (C.A. App. 162, 164-165).

Opinion and Order approving the Lawrence sale and denying the Association's request for a hearing (Pet. App. 10a-17a). The Commission pointed out that the proposed acquisition was not subject to Section 9(a)(2) or Section 10 of the Act, 15 U.S.C. 79i(a)(2) and 79j (Pet. App. 11a, n. 6), that the only issue that had been effectively raised by petitioner—the maintenance of competitive conditions—had been resolved in the Eastern proceedings, and that there were no other identifiable reasons offered in support of petitioner's request for a hearing on the Lawrence sale (Pet. App. 23a-24a).

A subsequent request for reconsideration merely reiterated petitioner's opposition to the plan, which the Commission had already considered in its October 31 order (C.A. App. 144-151). In addition, petitioner for the first time raised an objection to the acquisition by Springfield because of that company's relation to other gas and electric utility companies having common officials (C.A. App. 148, n. *), which petitioner subsequently refers to as the "Tenney Group" and as a "de facto holding company" (Pet. 5, n. 6). The Commission denied the new request for a hearing (Pet. App. 18a-25a) and briefly addressed itself to the new issue of "doubtful merit or relevance" that had been raised (*id.* at 23a and n. 9):

> [The Association's] statement that as a result of the sale Lawrence is transferred from one combination gas and electric utility holding company to another is unfounded. Springfield is not part of a statutory holding-company system, and

> none of the companies with which it has any administrative relationships conduct an electric utility business in Lawrence. The sale of Lawrence effectively separates its gas business from the electric service that NEES provides in that area.

The court of appeals affirmed the Commission in all respects, holding that the Commission did not abuse its discretion in refusing to consolidate the Lawrence proceeding with the Eastern proceeding and in denying petitioner's request for a hearing and its subsequent motion for reconsideration (Pet. App. 3a-6a). The court also addressed the substantive issues. It agreed with the Commission that the acquisition by Springfield was not subject to approval under Sections 9(a)(2) and 10, 15 U.S.C. 79i(a)(2) and 79j (Pet. App. 9a), and that the maximum two-year period provided in Section 11(c), 15 U.S.C. 79k(c), for compliance with a Section 11(b) order was not a limitation on the Commission's discretion to approve divestiture plans under Section 11(e) (Pet. App. 6a-7a). It also rejected petitioner's claim that the Commission had failed in its statutory obligation to investigate the alleged anti-competitive effects of the acquisition by the Tenney group (*id.* at 8a).

## ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other court. There is no reason for review by this Court.[10]

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[10] While petitioner refers to the "out-of-time plan" (Pet. 2) and the "belated transfer" (Pet. 6) approved by the Com-

1. Petitioner does not dispute the Commission's determination that its request for a hearing on the Lawrence plan did not comply with the requirements of Rule 23(e) of the Rules and Regulations promulgated under the Act, 17 C.F.R. 250.23(e). That rule, together with Rule 9(c) of the Commission's Rules of Practice, 17 C.F.R. 201.9(c), requires that anyone who requests a hearing must specifically identify the nature of his interest and the reasons that justify holding a hearing. The reasons given in petitioner's application were totally inadequate to satisfy these rules, as the court of appeals found (Pet. App. 5a):

> The requirement that the intervenors specify the issues which demand a hearing serves important purposes. It enables the Commission to screen out frivolous requests for hearings and efficiently conduct hearings. Here, where the

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mission, it does not challenge the finding of the court of appeals that the Commission may approve a Section 11(e) plan filed after expiration of the two-year period provided by Section 11(c) (Pet. App. 6a-7a), nor does it claim it was prejudiced by the delay. NEES originally had until April 3, 1969, to comply with the Commission's Section 11(b) order. By subsequent orders, however, the time was extended to April 2, 1970. *New England Electric System*, Public Utility Holding Company Act Release Nos. 16424 (July 11, 1969) and 16618 (February 24, 1970) (C.A. App. 107-108). These are not isolated examples of Commission approval of Section 11(e) plans after the two-year period allowed by Section 11(c). As an historical matter, full compliance with Section 11(b) orders issued by the Commission has often taken much longer than the two years anticipated by that section. See, *e.g.*, *Valley Gas Company, et al.*, 41 S.E.C. 867; *American Electric Power Company, Inc.*, 40 S.E.C. 564; *Louisiana Gas Service Company, et al.*, 40 S.E.C. 193.

> subject matter is so complex, poorly framed issues could turn the hearings into a maze in which justice could be lost. The strict application of those procedural rules seems appropriate here, where the intervenors were clearly on notice that they must comply with Rule 9.

Furthermore, petitioner's application for a hearing on the Lawrence plan contended only that the proposed sale raised many of the same objections that were raised in the Eastern proceeding (C.A. App. 102), in which petitioner fully participated (Pet. 10). As noted p. 6, *supra*, the only common question was whether NEES had maintained competitive conditions, an issue that had been resolved in the hearing on the Eastern plan. Thus, the Commission's refusal to consolidate the two proceedings or to accord petitioner a hearing on the Lawrence plan was not an abuse of discretion. *United States* v. *Interstate Commerce Commission*, 396 U.S. 491, 520-521.

2. Petitioner contends that the Commission was required by Section 9(a)(2) of the Act, 15 U.S.C. 79i(a)(2), to prohibit the sale of Lawrence to Springfield unless the Commission expressly found that the acquisition complied with the standards of Section 10, 15 U.S.C. 79j. Specifically, Section 9(a)(2) requires a company that already is an "affiliate," as defined in Section 2(a)(11)(A) of the Act, 15 U.S.C. 79b(a)(11)(A),[11] of one public utility com-

[11] Section 2(a)(11)(A) defines an "affiliate", *inter alia*, as an individual or company that owns or controls five percent or more of the voting stock of a specified company. Thus, the "affiliate" relationship exists between a parent and subsidiary.

pany to apply for Commission approval before it may acquire stock in another company that would become its second "affiliate." Petitioner argues that Springfield, which before the sale already had one subsidiary, *i.e.*, Northampton, had to meet the standards of Section 10 in order to purchase Lawrence, which would thereby become its second subsidiary.

The Commission and the court of appeals correctly rejected this argument. Concurrent with the Lawrence acquisition, Springfield and its former subsidiary, Northampton, merged to create the present parent company, Bay State. Thus, both before and after the acquisition, only a single affiliate relationship—Northampton and Springfield, followed by Bay State and Lawrence—existed. The Commission's interpretation of Section 9(a)(2) as giving effect to the final results of the sequence of the simultaneous corporate adjustments was a reasonable construction of the statute. As the court below held (Pet. App. 9a):

> We find the Commission's reasoning persuasive. In assessing interrelated corporate adjustments, comparison should be made of the situation just prior to and immediately following the adjustments. The sequence of relatively simultaneous corporate adjustments whose order has no practical effect do not govern the applicability of section 9(a)(2).

3. Petitioner's allegations that the Commission has frustrated the purposes of the Act and has contravened this Court's mandate in the *New England*

*Electric System* cases have no support in the record. To the contrary, the divestiture by NEES and purchase by Springfield have furthered these goals. Prior to the sale, Lawrence was owned by a holding company with electric utility holdings that, in many localities including Lawrence, competed directly with the retail gas business of the same system. Presently, however, neither Bay State nor any other company in the Tenney group serves electric customers in the Lawrence service area. Thus, the goal of Section 11(b)(1) to further competition in the public utility industry was achieved by the Commission's order.

Furthermore, the Commission's approval of the sale does not foreclose additional regulatory measures in the future should they appear necessary. The Tenney group is a loose affiliation of companies, predating the Act, arising primarily from the fact that members of the Tenney family have long been substantial stockholders in each of the companies and the companies have had the majority of their directors and executive personnel in common.[12] Although

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[12] C. H. Tenney, II, is the chairman and chief executive officer of Bay State, and held the same position with Brockton Taunton Gas Company, also a Massachusetts company, prior to that company's merger into Bay State in November 1974. The other utility companies in which Tenney and his associates are interested are Exeter & Hampton Electric Company and Concord Electric Company, both of which are incorporated in New Hampshire; Fitchburg Gas & Electric Light Company, a Massachusetts company; and Orange and Rockland Utilities, Inc., a New York company. Orange and Rockland, which has two wholly-owned subsidiaries serving contiguous areas in New Jersey and Pennsylvania, and Bay State

these facts alone do not make the group a holding-company system under the Act,[13] the Commission may designate any of its members as a holding company if, after a hearing upon notice, it appears that he has "such a controlling influence over the management or policies" of a public utility "as to make it necessary or appropriate in the public interest or for the protection of investors or consumers" that he "be subject to the obligations, duties, and liabilities" imposed by the Act upon holding companies.[14] Section 2(a)(7)(B), 15 U.S.C. 79b(a)(7)(B).

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are themselves exempt holding companies. The remaining companies are solely operating companies and conduct business only in the states in which they are incorporated. See Moody's *Public Utility Manual*, pp. 85-95, 2608-2609, 2679-2680, 2730-2733 and 2743-2744 (1975 ed.).

[13] Under Section 2(a)(7) of the Act, a company that owns 10 percent or more of the voting stock of a public utility is presumed to be a holding company, whereas a natural person who owns such control of a public utility is not.

[14] Petitioner's sole objection to the Tenney group apparently relates to a possible need to eliminate certain interlocking directorates, rather than the need for regulating that group as a holding-company system. A pending Federal Power Commission proceeding under Section 305(b) of the Federal Power Act, 49 Stat. 856, 16 U.S.C. 825d(b), has to some measure resolved the problems of which petitioner complains. Following a show cause order issued by the Federal Power Commission on September 15, 1975 (Pet. App. 43a-49a), Tenney and several associates either resigned or announced their intention to resign positions with Fitchburg Gas & Electric Company or with Orange and Rockland Utilities, Inc., which is by far the largest company in the Tenney group. See *Wall Street Journal*, October 6, 1975, p. 15, and November 10, 1975, p. 14. Significantly, it was under the Federal Power Act,

In addition, although Bay State is an exempt holding company because of the intrastate nature of its business, see p. 5, n. 4, *supra*, the Commission may terminate the exemption upon notice if it "finds the exemption detrimental to the public interest or the interest of investors or consumers * * *." Section 3(a), 15 U.S.C. 79c(a); Rule 6, Rules and Regulations under the Public Utility Holding Company ~~under the~~ Act, 17 C.F.R. 250.6. Thus, the Commission retains the power to exercise its full jurisdiction over Bay State should developments contrary to the public interest arise.

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which was enacted as part of the same legislation containing the Public Utility Holding Company Act, that Congress chose to regulate interlocking directorships and officers. As the court below noted (Pet. App. 8a), "[e]limination of common officers and directors in noncompeting utility companies was not the precise purpose of the Act." The division of authority between the Federal Power Commission and the Securities and Exchange Commission only highlights the distinction that should be drawn between dealing with interlocking directorates and regulating persons as holding companies.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1975.

## APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79, *et seq.*:

Section 2(a), 15 U.S.C. 79b(a):

When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company

under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and

to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

Section 2(b), 15 U.S.C. 79b(b):

No person shall be deemed to be a holding company under clause (B) of paragraph (7) of subsection (a), or a subsidiary company under clause (B) of paragraph (8) of such subsection, or an affiliate under clause (D) of paragraph (11) of such subsection, unless the Commission, after appropriate notice

and opportunity for hearing, has issued an order declaring such person to be a holding company, a subsidiary company, or an affiliate, or declaring a class of which such person is a member to be affiliates. Such an order shall not become effective for at least thirty days after the mailing of a copy thereof to the person thereby declared to be a holding company, subsidiary company, or affiliate; or, in the case of determination of affiliates by classes, until at least thirty days after appropriate publication thereof in such manner as the Commission shall determine. Whenever the Commission, on its own motion or upon application by the person declared to be a holding company, subsidiary company, or affiliate, finds that the circumstances which gave rise to the issuance of any such order no longer exist, the Commission shall by order revoke such order.

Section 3(a), 15 U.S.C. 79c(a):

The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

> (1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in

character and carry on their business substantially in a single State in wihch such holding company and every such subsidiary company thereof are organized;

Section 12(d), 15 U.S.C. 79*l*(d):

It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Rules and Regulations, Public Utility Holding Company Act of 1935:

Rule 6, 17 C.F.R. 250.6:

*Termination of exemptions.* If it appears to the Commission (on the basis of statements claiming exemption or otherwise) that a substantial question of law or fact exists as to whether any holding company claiming exemption under § 250.2, § 250.3, § 205.4, § 250.5, or § 250.10 or any other section now or hereafter in force pursuant to section 3(a) of the

act exempting any class of holding companies from the registration requirements of the act, is within the exemption afforded by any such section, or if it appears that any question exists as to whether the exemption of any such company may be detrimental to the public interest or the interest of investors or consumers, the Commission may notify such holding company to that effect by registered mail. Thirty days after such notification, such exemption shall terminate, without prejudice to the right of such holding company to file an application for an order granting such an exemption pursuant to any applicable section of the act, and without prejudice to any temporary exemption provided for by the act if such application is filed in good faith.

Rule 23(e), 17 C.F.R. 250.23(e):

*Notice of filing.* The Commission will publish in the FEDERAL REGISTER notice of the filing of a declaration or application, stating the earliest date upon which such declaration or application, as filed or as amended, may be permitted to become effective or be granted. Any interested person may, not later than fifteen days after the publication of such notice or such other date as may be fixed therein, request the Commission in writing that a hearing be held, stating his reasons therefor and the nature of his interest.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-607

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ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,
*Respondents.*

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## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

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To evade the substantive issue AMC inconveniently insists upon pressing here, SEC and its handmaiden Bay State make an essentially procedural response. Under the Public Utility Holding Company Act of 1935, SEC has the responsibility to achieve a divestiture which complies with the public interest standards of the Act. Accordingly, SEC should be in a position, were it doing its job, to show in a detailed, evidentiary fashion that the NEES divestiture of Lawrence Gas

Company meets the statutory standards—i.e., that it is not, as AMC contends, a mere ritualistic transfer of utility property from NEES frying pan into the Tenney Group fire.

But SEC has made no such showing. On the contrary, its citation of the enforcement action against the Tenney Group taken by FPC under its limited statutory powers tends to confirm AMC's position that the Tenney Group is at least prima facie an impermissible purchaser of the Lawrence Gas Company (S.G. Br., pp. 13-14). While FPC has jurisdiction to prevent interlocking relationships, SEC is charged with the basic responsibility for regulating the substance of corporate relationships as they impinge on consumer interests.

The principal substantive contention made by SEC and Bay State to remove this transaction from the scope of Sections 9(a)(2) and 10 is not that such a transfer can be permitted absent specific SEC authorization, but that it was only a step in a series of transactions (S.G. Br., pp. 11, 12), was motivated by tax avoidance considerations (Bay State Br., pp. 11, 12), and thus should be ignored.* Never has the tax avoidance tail wagged a more impressive dog. Now the normal application of statutory law has joined the list of sound criteria to be superseded by the Great American Principle of Tax Law, that tax revenues must, at all costs, be held to a minimum. Aside from its in-

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* Bay State argues (B.S. Br., p. 11) that the transactions are subject to Sections 9(a)(2) and 10 only "for a *scintilla juris.*" This phrase, borrowed from late medieval conveyancing theory, is not defined, but appears from its context to mean a time period of unspecified length during which laws are superseded and anything goes.

validity, this argument does such extreme violence to SEC's jurisdictional reach by eliminating from it matters which Congress placed within it, that future SEC commissioners and Solicitors General will be greatful if this Court declines to accept it.

The procedural arguments advanced by SEC and Bay State, even given their maximum possible weight, should not countervail AMC's principal point, that SEC has the responsibility to accomplish divestiture relief in this case which is unequivocably in the public interest. Two decisions of this Court attest that the 1964 SEC order calling for the NEES divestiture of its gas distribution properties is in the public interest. The adverse effects on consumer interests flowing from Bay State's acquisition of one of these properties, and the failure of SEC to inquire into them, are central to AMC's complaint. They are not gainsaid by the procedural arguments advanced by SEC and Bay State.

Moreover, the procedural arguments themselves are infirm. The first of them is that AMC's original petition was too generally drawn and merely incorporated by reference criticisms it had already leveled against the NEES divestiture of other subsidiaries' stock to Eastern Gas and Fuel Associates (S.G. Br., pp. 10-11). In its original decision authorizing the sale of Lawrence Gas Company stock to the Tenney Group, SEC made no such particularized contention. Indeed, in the Lawrence case SEC ignored AMC's interest and did not even serve AMC with a copy of its decision. AMC, which was not obliged to petition for rehearing in order to secure court review of this obviously defective decision, did so in an effort to persuade SEC to fulfill its statutory responsibilities. Only then did SEC raise this specious point—specious because SEC knew all along

that AMC's criticisms of the proposed NEES divestiture were directed both to the procedures for accomplishing it and to the impermissible purchaser these procedures had led to.

The second procedural argument is that AMC somehow failed to exhaust its administrative remedies in the SEC proceeding because it did not participate in State proceedings conducted by the Massachusetts Department of Public Utilities pursuant to Massachusetts law, where some common issues were considered. (Bay State Br., p. 13). If AMC had been a party to the Massachusetts proceedings (it had not) and if the Massachusetts Department of Public Utilities had been exercising some function under the Public Utility Holding Company Act of 1935 (it was not), this argument might possibly be germane. Under existing circumstances, it is inapplicable.

The third procedural argument SEC and Bay State advance is that AMC has already had its hearing. They cite the Eastern proceeding, an inapposite matter which they themselves contend involved different properties, a different purchaser, and different issues (Bay State Br., pp. 3, 13-14; S.G. Br., pp. 6-7, 11), and which reached a far different result. True, a hearing was ordered in that proceeding and AMC did participate in it; but the hearing was terminated midstream, concluded because Eastern Gas & Fuel Associates, the acquiror of the stock of the divested properties, chose to make settlement with AMC and other intervenors which substantially met at least minimum public interest standards. This settlement provided an option to the communities served by the gas properties in question whereby they might acquire them for municipal operation. In addition it required Eastern Gas & Fuel Associates,

an exempt holding company, to seek SEC approval of future acquisitions of utility properties under the standards of Sections 9(a)(2) and 10 of the Act. Unfornately, no such accommodation of local consumer interests was made in the Lawrence Gas Company case. Had it been, AMC would not be here petitioning for a writ of certiorari.

Respectfully submitted,

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